IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1960

No. [redacted]

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

Respondents.

BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,

Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners, Board of Education of the City of Los Angeles and Board of Education of the City of San Diego, pray that writs of certiorari issue to review the judgments of the Supreme Court of the State of California filed therein on January 24, 1961, rehear-

ings in which were denied by that Court on February 21, 1961. These cases, which were there consolidated for argument, involve identical questions, and are therefore treated in a joint petition.

CITATIONS TO OPINIONS BELOW

The opinions by a seriously divided majority of the Supreme Court of the State of California, reproduced in Appendix "A" to this petition, were filed in both cases on January 24, 1961. The opinion in the Los Angeles case is reported in 55 Adv. Cal. 170, and the opinion in the San Diego case is reported in 55 Adv. Cal. 190. The judgments are the last sentences of each opinion (R.23; Appx. 20-21A (Los Angeles), and R.34; Appx. 24A (San Diego)). The separate dissenting opinions in each case of three of the seven justices of the Supreme Court (Associate Justices White, Schauer and McComb) (R. 24-32 (Los Angeles) and R. 35-36 (San Diego)) are reproduced in Appendix "B" to this petition and are reported in 55 Adv. Cal. 185 (Los Angeles) and in 55 Adv. Cal. 191 (San Diego).[1]

The order of the Supreme Court of the State of California filed on February 21, 1961 in both cases, denying petitioners' joint petition for rehearing, with-

[1]Each of the dissenting opinions in each case incorporates the opinion of Mr. Presiding Justice Fox, speaking for a unanimous three justice court when these cases were pending before the District Court of Appeal of California, Second Appellate District, Division Two, reported in 5 Cal. Rptr. 215. These opinions, a necessary adjunct to a full consideration of these cases, are reproduced in full in Appendix "C" to this petition, and are also included as part of the certified record.

out opinion, but with three (Associate Justices White, Schauer and McComb) of the seven justices dissenting, is not reported and appears as the second last document in the certified record of the Supreme Court.

JURISDICTION

The judgment of the Supreme Court of the State of California in each case was entered on January 24, 1961 (R. 1 (Los Angeles), and R. 33 (San Diego)). A timely joint petition for rehearing in that Court was denied in both cases by a joint order of the Supreme Court of the State of California filed on February 21, 1961 (R. 39, (Los Angeles), and R. 39, (San Diego)). This Court has jurisdiction under United States Code, Title 28, Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the First Amendment to the United States Constitution insofar as it is made applicable to the States by the Fourteenth Amendment to the United States Constitution, prevents the State of California from requiring that applicants seeking the use of public school facilities furnish a "statement of information" advising that to the best of the applicant's knowledge (1) that the organization which will use the school property will not use it for any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the

Government of the United States by force or violence, and (2) that the organization which will use the school property does not advocate the overthrow of the Government of the United States or of the State of California by force, violence or other unlawful means and is not a communist-action or communist-front organization required by law to be registered with the United States Attorney General.

2. Whether the California statute authorizing the disclosure to school authorities of the information required by the "statement of information", set forth in question No. 1, *supra,* as here interpreted by the Court below, imposes an unconstitutional prior restraint on the protection afforded by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment to the United States Constitution.

3. Whether the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment to the United States Constitution, as here applied to petitioners, prevents a limited inquiry by the State into the background and bona fides of those seeking the use of school property, thus effectively obstructing the investigation that school officials must make in order to insure that school facilities will not be used for illegal purposes.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

California Education Code, Sec. 16564 (Cal. Stats. 1959, ch. 2, Based on former Cal. Ed. Code, Sec. 19440, as added by Cal. Stats. 1951, ch. 767, p. 2259) in relevant part provides:

> "Any use, by any individual, society, group or organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered."

California Education Code, Sec. 16565 (Cal. Stats. 1959, ch. 2. Based on former Cal. Ed. Code, Sec. 19441, as added by Cal. Stats. 1951, ch. 767, p. 2260, amended by Cal. Stats. 1953, ch. 880, sec. 1, p. 2235) in relevant part provides:

> "No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.
>
> "For the purpose of determination by such governing board whether or not any individual, society, group or organization applying for the use of such school property intends to violate Section 16564, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

"STATEMENT OF INFORMATION

"The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence or other unlawful means:

"That.....the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California by force, violence, or other unlawful means, and that, to the best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

.....

(Signature)

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made would not violate Section 16564 of the Education Code."

The First and Fourteenth Amendments to the United States Constitution are also involved herein and are set forth in relevant part in Appendix "D" to this petition.

STATEMENT OF THE CASE

1. Proceedings In The Courts Below.

Respondents American Civil Liberties Union of Southern California (hereinafter termed "A.C.L.U.") made separate applications to the Board of Education of the City of Los Angeles and to the Board of Education of the City of San Diego for permission to use certain public school buildings in those cities in which to hold a series of monthly meetings which would be open to the public.[Fn] California Education Code Section 16565, implementing Section 16564 of the same Code, requires that applicants seeking the use of school property must execute and deliver a statement of information signed by a member of the organization seeking the use, stating under penalty of perjury and to the best of the applicant's knowledge, that the school property will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish forceful overthrow of the Government of the United States and that the organization on whose behalf he is making application does not advocate the forceful overthrow of organized government and that the organization is not a communist-action or communist-front organization required by law to be registered with the United States Attorney General. Their application in each instance was denied by the respective school boards because each applicant

[Fn] The State of California permits such use of school property for public purposes. (Calif. Education Code, Sections 16551-16566)

failed and refused to furnish the "Statement of Information."

Thereafter, the A.C.L.U. in two separate original proceedings applied to the Supreme Court of California for writs of mandate, demanding that that organization be allowed to use certain public school buildings in the City of Los Angeles and the City of San Diego without subscribing to the "Statement of Information" on the grounds that Sections 16564 and 16565 of the Education Code were unconstitutional under the First and Fourteenth Amendments to the Federal Constitution and Article I, Sections 9 and 10 of the State Constitution.[Fn]

The California Supreme Court transferred both cases to the District Court of Appeal, Second Appellate District for hearing, which Court issued alternative writs of mandate in both cases. After consolidated hearings, the District Court in two unanimous written decisions discharged the alternative writs of mandate (Appendix "C," 36C (Los Angeles), and Appendix "C," 37C (San Diego)), thus upholding the right of school boards to inquire, to the limited extent set forth by statute, into the background and bona fides of the

[Fn] Article I, Sections 9 and 10 of the Constitution of the State of California are counterparts to the First Amendment to the Federal Constitution, and provide in pertinent part as follows:

> Sec. 9, Article I: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . ."
>
> Sec. 10, Article I: "The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

organizations requesting the use of school premises. (See: Appendix "C")

The Supreme Court of the State of California granted hearings in both cases and thereafter by a narrow four to three margin held in favor of the A.C.L.U. in both cases. Indicating that the basis for the refusal of the A.C.L.U. to furnish the prescribed "Statement of Information" was a claimed abridgment of both the state and federal constitutional guarantees of freedom of speech and assembly (R. 3, 3A (Los Angeles), and R. 33, 23A (San Diego)), the California Supreme Court held unconstitutional that portion of Section 16565 of the Education Code that requires the applicant to state that, to the best of his knowledge, the organization on whose behalf the application is being made does not advocate unlawful overthrow of the government and is not, to the best of applicant's knowledge, an organization required by law to be registered with the Attorney General of the United States. Relying heavily on this Court's holding in *De Jonge v. Oregon*, 299 U.S. 353 and on its own decision in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, which case held unconstitutional an earlier version of Section 16565, the Court reasoned that this portion of the State statute was aimed at preventing certain proscribed organizations from holding public meetings while allowing all others to do so, and as such was an unconstitutional encroachment on the right of free speech and assembly. (Appx. "A," 9A)

The Court indicated that despite Federal and State legislative findings to the contrary regarding the nature and objective of the Communist conspiracy, the school authorities had not shown that a "clear and present danger" to the community would exist if Communists or Communist affiliates were permitted to hold public meetings in public schools. The Supreme Court further held that Section 16564 of the Education Code set up an unconstitutional power of prior restraint upon the preferred rights of freedom of speech and assembly guaranteed by the Constitution.[Fn] (Appx. "A," 18A)

2. Presentation of Federal Questions In The State Courts.

Supreme Court of the State of California. In their original applications[Fn] for Writs of Mandate to the State Supreme Court, the A.C.L.U. argued that the requirement that they subscribe to the "Statement of Information" as set forth in the Education Code is unconstitutional because it abridges freedom of speech and of assembly in violation of the federal and state constitutions, and that no "clear and present danger" to the community as that phrase was construed by this Court in *Dennis v. United States,* 341 U.S. 494, and *Yates v. United States,* 354 U.S. 298, is shown in these

[Fn] Not material here is the fact that the Supreme Court also determined that the issues presented by these cases were not moot. (Appx. "A", 20A)

[Fn] A complete certified set of the briefs of all parties in both cases as well as the briefs of Amicus Curiae American Jewish Congress and Amicus Curiae Friends Committee on Legislation of Northern California has been filed with the Clerk of this Court.

cases; other constitutional points raised by the A.C.L.U. in their briefs were that the California statute deprived them of procedural due process of law as interpreted by this Court in *Speiser v. Randall*, 357 U.S. 513, and that the state statute further offends due process because its language is vague, indefinite and uncertain. (Petn. for Writ, p. 6, Memo. Pts. and Auth. p. 1, 9 and 19)

Petitioners[Fn.] answered these constitutional arguments, alleging that the Education Code requirements do not infringe upon areas of constitutionally protected speech and assembly since those areas are not protected absolutely (Pet. L.A. Ret. to Alt. Writ, p. 3) and that the interests of the public under the circumstances of this case, where the particular danger—overthrow of the government by force and violence—has been recognized on both the state and federal levels, far outweigh any competing private interests (Pet. L.A. Ret. to Alt. Writ, p. 6-9; Pet. S.D. Memo. Pts. and Auth., p. 9-13). Petitioners further contended in their briefs that the limited inquiry required by the statute did not offend procedural due process through a shifting of the burden of proof in the manner struck down by this Court in *Speiser v. Randall*, 357 U.S. 513. (Pet. L.A. Ret. to Alt. Writ, p. 9; Pet. S.D. Memo Pts. and Auth., p. 4) Amicus briefs filed on behalf of

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Fn Where separate briefs were filed in the Courts below by petitioners, briefs of petitioners Board of Education of the City of Los Angeles will be designated as "L.A." and briefs of petitioner Board of Education of the City of San Diego will be designated as "S.D."

the Friends Committee on Legislation of Northern California and on behalf of the American Jewish Congress each raised the federal constitutional issue that the Education Code sections impose a prior restraint on freedom of speech and assembly in violation of the First and Fourteenth Amendments to the Federal Constitution. (Friends, Memo. Pts. and Auth., p. 1-2; Br. Am. Jew. Cong. p. 4-8) This particular constitutional issue was specifically answered in separate briefs filed by petitioner (S.D.) who argued that the pubilc interest in the use of public schools far outweighs the limited scope of abridgment of First Amendment rights. (Resp. Reply to Am. Jew. Cong., p. 2-6; Resp. Reply to Am. Curiae, p. 2-11)

District Court of Appeal. The District Court of Appeal in its opinions specifically passed on the issue of whether the furnishing of a "Statement of Information" required under the California statute is an unconstitutional infringement upon the rights of free speech and assembly under the First Amendment to the Constitution of the United States and as guaranteed by the California Constitution. (Appx. "C," 3C, 9C) The District Court in holding the sections constitutional, relied almost exclusively on this Court's decisions in cases involving the First and Fourteenth Amendments to the Federal Constitution.

Supreme Court of California. The petition of the A.C.L.U. for hearing in the Supreme Court of California after an adverse decision in the District Court

again raised the issue that California Education Code Section 16565 violates state and federal constitutional guarantees of freedom of speech and assembly. (Pet. for Hearing, p. 4-9) As well, the petition for hearing raised the constitutional issue that the Education Code section violates procedural due process of law under this Court's decision in *Speiser*, supra. (Pet. for Hearing, p. 9-13) These points were specifically controverted in a brief filed by petitioner L.A. (L.A. Answer to Pet.)[fn] The decision of the Supreme Court of California presented the issue of the cases as whether the "Statement of Information" prescribed by the Education Code "abridged both the state and federal constitutional guarantees of freedom of speech and assembly. (U.S. Const., Amendments I and XIV; Cal. Const., Art. I, § 9, 10)." (Appx. "A," 3A)

REASONS FOR GRANTING WRIT

The Supreme Court of the State of California has here decided fundamental issues involving First Amendment rights of free speech and assembly which are of major significance to all school officials in the State of California and of importance to all potential users of public school property. The facts of these cases present novel questions regarding the extent to which a State may go in determining what use may be made of school property controlled by it. The issues of these

[fn] A letter brief submitted by petitioner S.D. answering these points was received and considered by the Supreme Court prior to the rendering of its decision. While this brief was not filed with the Court below as part of the record, a copy is being filed with the Clerk of this Court.

cases as here construed and applied have not heretofore been definitively determined by this Court. Further, the decision by the State Court appears to have misinterpreted the principles and doctrines laid down by this Court and in so doing restricted the area of legitimate inquiry by the State as to beliefs and convictions of those seeking to make use of public schools for public meetings.

I.

IN LABELING AS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH AND ASSEMBLY, THE LIMITED INQUIRY BY THE STATE INTO THE CHARACTER AND NATURE OF ORGANIZATIONS SEEKING TO USE PUBLIC SCHOOLS, THE SUPREME COURT OF CALIFORNIA HAS MISAPPLIED THAT PRINCIPLE AS ESTABLISHED BY THIS COURT.

In a series of decisions considering the nature of the protection afforded individuals by the First Amendment rights of free speech and assembly as made applicable to State action by the Fourteenth Amendment, this Court has never considered those rights to be absolute.[Fn] (See: *Near v. Minnesota*, 283 U.S. 697; *Whitney v. California*, 274 U.S. 357; *Times Film Corp. v. Chicago*, ... U.S. ....., 5 L. Ed. 2d 403; *American Communications Assn. v. Douds*, 339 U.S. 382)

[Fn] In this regard it should be noted that the Court below refers to First Amendment rights as occupying a "paramount and preferred" place in law. (R. 16, Appx. "A" 15A, 19A) As pointed out by Mr. Justice Frankfurter in his concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, this concept has never commended itself to a majority of this Court.

The test applied in those cases where official action is in conflict with First Amendment rights is whether such action is justifiable on the basis of a superior or supervening governmental interest to which individual rights must yield. (*Barenblatt v. United States*, 360 U.S. 109; *Uphaus v. Wyman*, 360 U.S. 72; *Times Film Corp. v. Chicago*, supra.)

Obviously, the use to which school property will be put is of valid concern to the State, for it is inconceivable that the State can be said to have no interest in assuring itself that schools will not be used as a convenient "community center" for subversive activity. Under its police power and under its power to protect itself from subversion, the use of school property for such inimical purposes may be regulated, since school property unlike streets and parks, has never "immemorially been held in trust for the use of the public." (cf. *Hague v. Committee for Industrial Organization*, 307 U.S. 496 at 515)

While the State is not obligated to furnish school facilities to the public, (*Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536) the Legislature of the State of California has authorized school property to be used for civic center purposes. (Calif. Education Code, Secs. 16551-16566.) Within these provisions it has imposed certain narrow requirements that the use be for certain public purposes and that the use be not by organizations which advocate the forceful overthrow of organized government nor for acts intended to overthrow

the government by force and violence. These prohibitions are buttressed by legislative findings that a world-wide revolutionary movement to establish a totalitarian dictatorship exists, that the objectives of this movement are inimical to organized government, and that from this movement a clear and present danger which is great and imminent exists to threaten the State. (Calif. Gov. Code, Sec. 1027.5, Appx. "A," 9A, Appx. "C," 8C) Relying on these findings, the Legislature has delegated to the governing boards of the local school districts the duty of investigating and determining when use of school property should be denied. The governing boards of the local school districts in Los Angeles and in San Diego, in their efforts to enforce this legislative mandate, require applicants for use of school property to furnish the statement of information required by Section 16565 of the California Education Code.

The State Court based its conclusion that the disclosure of information required by the statute was unconstitutional by holding that disclosure of Communist Party membership has no reasonable tendency to prove that the forbidden acts would be committed in public meetings. (Appx. "A" 18A). By so doing the State court erred, fundamentally, we believe, by failing to give any legitimacy whatsoever to the legislative findings regarding the nature and objectives of the Communist conspiracy. (Appx. "B," 4B) Thus the California court set up the "paramount and preferred rights" of speech and assembly on one side of the scale of social

values without considering as a countervailing balance the State's interest in protecting itself against what the State has found Communists and their affiliates *have done* in the past and are *likely* to do again. (Appx. "B," 2B).

In *Gitlow v. New York*, 268 U.S. 652, this Court decided that determinations by a state legislature concerning utterances advocating the overthrow of organized government by force, violence or other unlawful means must be given great weight and every presumption must be indulged in favor of the validity of the statute. In *Dennis v. United States*, 341 U.S. 494, this Court held that organized government need not wait until after its foes have struck to take action to protect itself, and with respect to determinations made by a state legislature that a certain kind of speech was, itself, harmful and unlawful, ". . . (T)he constitutionality of such a state statute had to be adjudged (on the grounds of) whether the statute was reasonable." (*Id.* 506) (Brackets added). It is of course, entirely reasonable for a State to attempt to protect itself from violent overthrow. (*Dennis v. United States,* supra, cf. *Konigsberg v. State Bar of California,* ..... U.S. ....., 29 L.W. 4341)

Prior inquiry by school officials into the potential use of school property and the character of the applicant requesting such use is a sphere of legitimate governmental concern. (cf. *Barenblatt v. United States*, supra, *Speiser v. Randall*, 357 U.S. 513, *American Communications Assn. v. Douds*, supra)

The Legislature of the State of California has weighed the competing interests at stake and has resolved them in favor of permitting a restricted inquiry in this limited area.[Fn] This Court has in other similar instances resolved competing interests of government vis-a-vis individuals in favor of the government's right to protect itself. In *Konigsberg v. State Bar of California,* supra, this Court stated at 4346: "Nor is the state interest in this respect insubstantially related to the right which California claims to inquire about Communist Party membership. This Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes. (Citations)."

In the light of this legitimate concern of the State in this area, the inquiry made by school officials certainly has a substantial relevance thereto. (See *Barenblatt v. United States,* supra, *Uphaus v. Wyman,* supra) The investigation made is limited to finding out whether or not the organization seeking the use of the schools intends to commit the proscribed acts of overthrow of the government, advocates such overthrow, or is required by law to be registered with the Attorney General of the United States. If an organization answers this inquiry in the affirmative, it is highly probable

[Fn] Compare the restricted inquiry made here with the broadgauge inquiry by state officials struck down by this Court in *Shelton v. Tucker,* ... U.S. ..... 5 L. Ed. 2d 231.

that such organizations will commit the proscribed acts. All of the required information is therefore vital to an advance determination by school boards as to whether or not acts of overthrow, as contra-distinguished from mere doctrinaire discussion of principles, (cf. *Yates v. United States*, 354 U.S. 298) will be committed on school premises.

It is submitted that the decision of the Court below in holding such a limited inquiry by the State a violation of the Constitution of the United States jeopardizes the State's power to make legislative determinations and investigations which this Court has recognized as valid.

II.

BY ALLOWING APPLICANTS FOR PRIVILEGES CONFERRED BY THE STATE TO REFRAIN FROM ANSWERING MATERIAL INQUIRIES WHICH ARE A MATTER OF LEGITIMATE AND SUBSTANTIAL CONCERN TO THE STATE, THE SUPREME COURT OF CALIFORNIA UNNECESSARILY RESTRICTS THE INVESTIGATORY POWERS OF THE STATE, DESTROYING RIGHTS WHICH THIS COURT HAS SAID HAVE BEEN PRESERVED TO THE STATE.

A person desiring to remain silent and invoke the privilege of the First Amendment, as made applicable

to a State by the Fourteenth Amendment is, in certain instances,[Fn.] within his rights in so doing. But where the State holds out a privilege or a benefit to an individual, on consideration that the individual make known the use to which the benefit is to be put, [Fn.] he may not then invoke his constitutional right to remain silent and still expect to have the benefits conferred upon him. This Court has so held in numerous decisions: *Garner v. Board of Public Works,* 341 U.S. 716 (an applicant for public employment was not privileged to remain silent and refuse to subscribe to an oath relating to knowingly belonging to the Communist party in the recent past, and still accept public employment); *Gerende v. Board of Supervisors,* 341 U.S. 56 (a candidate for public office may not refuse to file an affidavit that he is not a subversive person and still be privileged to appear on an election ballot); *American Communications Assn. v. Douds,* 339 U.S. 382 (a labor union official may not refuse to file an affidavit declaring his nonaffiliation with the Communist party and his nonbelief in forceful overthrow of organized government and preserve to his union the privilege of using the facilities provided by the National Labor Relations Act): *Barenblatt v. United States,* 360 U.S. 109 (a person may not invoke the First Amendment

[Fn] Where as here the person asserts *only* First Amendment—not Fifth Amendment—rights, the test of applicability of those rights stand on grounds different from those where Fifth Amendment rights alone are asserted. (*Barenblatt v. United States,* 360 U.S. 109; See: *Quinn v. United States,* 349 U.S. 155.)

[Fn] It is to be emphasized here that the information required is not of every potential use to which the premises may be put, but that only that the premises will not be used for certain delineated illegal acts of overthrow. (Cf. *Shelton v. Tucker,* .... U.S. .... 5 L. Ed. 2d 231)

and refuse to answer inquiries reasonably related to a valid legislative purpose); *Konigsberg v. State Bar of California*, ... U.S. ....., 29 L.W. 4341, and *In re Anastaplo*, ... U.S. ....., 29 L.W. 4355 (applicants for admission to State Bars may not refuse to answer pertinent inquiry and still be admitted to professional practice). Each of these cases recognize the right of the individual to remain silent by invoking the First Amendment. If a privilege hinges on disclosure however, that privilege may be denied unless the applicant is willing to speak. If a supervening valid legislative inquiry is involved, that privilege must give way.

Petitioners submit that the State Court did not follow this concept when it reasoned that the only way the State can prevent acts of overthrow is to do as the federal government has done in the Smith Act and make such acts criminal. (Appx. "A," 16A)

The Legislature of the State of California has the obligation to the citizens of the State to see that the tenets of democratic government are protected. Forceful overthrow of organized government is not within the framework of our democratic system. If citizens or organizations wish to make private forums available to persons or groups who intend to overthrow the government by force and violence, the State does not here prohibit them from so doing. However, the State has chosen to limit, to the limited extent available to it, the use of its public facilities by those which it has found and determined to be enemies of the State.

To determine whether the applicant will use school property for an overt act of overthrow or whether the group has as one of its beliefs the forceful overthrow of organized government the State has authorized local school officials to make an investigation of the applicant. The first part of the investigation is the required statement of information (Calif. Education Code, Sec. 16565) If the applicant furnishes the statement of information, the school board may need to make further inquiry. If the board finds that the statements contained therein are not true, and if they were knowingly made when untrue, the State may punish the applicant for perjury, with all the constitutional protections available to those charged with a crime. (*American Communications Assn. v. Douds,* 339 U.S. 382) This is the first step in the investigation of the applicant. If, however, at the threshold, the applicant fails and refuses to furnish this pertinent information, the investigatory powers of the school board are obstructed, and it can go no further with its investigation.

By denying use of school property to those who refuse to answer "we do not advocate the overthrow of your government" the State is in effect saying that those who refuse to answer this relevant question have obstructed the investigation of the governing board who must determine what use will be made of the property. The school board then has no alternative but to consider for the purposes of that application, that the questions posed are answered in a way unfavorable to the

party refusing to answer. (Cf. *Konigsberg v. State Bar of California*, supra.)

The decision of the Supreme Court of California, made without the guidance of this Court's recent decision in *Konigsberg*, supra, unnecessarily restricts the State's investigatory power over property under its direct control.

CONCLUSION

This petition should be granted because the Supreme Court of the State of California has decided questions under the Federal Constitution in a way which is inconsistent with the decisions of this Court. Of greatest importance is the fact that the State Court's decision if allowed to stand will greatly hamper the efforts of the State to make limited investigations into matters of legitimate and substantial governmental concern.

Petitioners pray that this Honorable Court grant the writs of certiorari.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California Corporation; EASON MONROE, Director and WILLARD CARPENTER, Associate Director, *Petitioners,*	)	L. A. 25788
vs.	)	
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, *Respondent.*	)	

Petitioners seek a writ of mandate to compel the Board of Education of the City of Los Angeles to grant their application for the use of the John Burroughs Junior High School Auditorium in which to hold a series of monthly public meetings on the general theme of "The Bill of Rights in 1960." Their application was denied by respondent board because petitioners refused to furnish the "Statement of Information" as required by section 16565 of the Education Code, which implements section 16564 of the same code (formerly §§ 19440 and 19441).

The pertinent portion of section 16564 reads: "Any use, by any individual, society, group, or organization for the commission of any act intended to further any program or movement the purpose of which is to ac-

complish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered." Implementing section 16565, as here material, provides: "No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.

"For the purpose of determination by such governing board whether or not any individual, society, group, or organization applying for the use of such school property intends to violate Section 16564, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

STATEMENT OF INFORMATION

"The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence or other unlawful means;

"That ...., the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California by force, violence, or other unlawful means, and that, to the

best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

.....

(Signature)

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made would not violate Section 16564 of the Education Code."

Petitioners refused to furnish the prescribed statement primarily on the ground that such test oath requirement abridged both the state and federal constitutional guarantees of freedom of speech and assembly. (U.S. Const., Amendments I and XIV; Cal. Const., art. I, §§ 9, 10.)

The sections of the Education Code here under attack were obviously adopted in an attempt to meet the constitutional objections to the former section 19432 of the Education Code, which we held unconstitutional in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536. That section prohibited in express terms the use of the "civic center" in any school building by "any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of govern-

ment of the United States or of the State by force, violence, or other unlawful means." We held in Danskin (28 Cal. 2d pp. 545-546) that while "[t]he state is under no duty to make school buildings available for public meetings . . . [i]f it elects to do so . . . it cannot arbitrarily prevent any member of the public from holding such meetings . . . [n]or . . . make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property."

We further quoted from *De Jonge v. Oregon,* 299 U.S. 353: "The holding of meetings for peaceable political actions cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them

for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge. We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party." (28 Cal. 2d pp. 552-553.)

We concluded: "When one searches deeper for the reason that motivates the prohibition of such meetings, there is no escaping the conclusion that the Legislature denies access to a forum in a school building to 'subversive elements,' not because it believes that their public meetings would create a clear and present danger to the community, but because it believes the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate. What it does not tolerate it seeks to censor. (28 Cal. 2d p. 545.) . . . Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. (28 Cal. 2d p. 546.) . . . If it is unconstitutional for the state to prohibit certain persons or groups classified as 'subversive elements' from exercising their rights of free speech and assembly at places where others are allowed to speak and assemble, it is *a fortiori* unconstitutional to require

proof from any persons or groups that they are not subversive elements." (28 Cal. 2d p. 548.) Specifically with reference to De Jonge, quoted *supra,* we added: "The De Jonge case cannot be distinguished on the ground that it involved a criminal statute, while the statute in the present case sought to suppress free speech and assembly by requiring an administrative board to deny permits for meetings of those whose objects and affiliations are disapproved. In each case the state sought to suppress free speech and assembly and it is immaterial that it sought to accomplish that objective in the one case by threat of punishment and in the other by censorship." (28 Cal. 2d p. 553.)

Having thus clearly held that the statute then before us was unconstitutional for denying to "subversive groups" the right to use school "civic centers" for assemblies and the exercise of the right to speak freely therein, without regard to the lawful or unlawful purpose or character of such meetings, we added: "The state must be on the alert for any clear and present danger to the community, sensitive to the warning signals, the ambiance in which a forum is planned, the atmosphere that envelops it. It cannot look with equanimity upon those whose words or actions have already left in their wake a trail of violence.

"Always it must distinguish, however, between speech, no matter how unorthodox, that remains on a theoretical plane, and speech, no matter how skillfully

intoned, that creates a clear and present danger to the community." (28 Cal. 2d pp. 553-554.)

The Legislature in enacting sections 16564 and 16565 was attempting, without doubt, to bring its regulations within the constitutionally permitted area, thus adverted to by us in Danskin, by limiting its regulation to the permissible field of prevention of speech and assembly in school buildings which would constitute "a clear and present danger to the community." It is argued by respondent that it has done so. On the other hand, petitioners point to the language of section 16564: "Any use . . . for the commission of any act intended to further any *program* or *movement the purpose of which* is to accomplish the overthrow of the Government . . . by force, violence, or other unlawful means . . ." (emphasis added); and argue that the language is so broad in its scope as to include acts which would not create the clear and present danger which permits the preventive or punitive action of the state, and would prohibit speech or other conduct "that remains on a theoretical plane" as well. We accept the argument of respondent in this particular that the quoted language, in order to avoid this constitutional objection, should be construed to reach and prohibit only such "acts" as would constitute a "clear and present danger," as that term has been construed by the United States Supreme Court. This concession, however, is of little importance when we return to the requirements of section 16565. That section as pres-

ently in force provides: ". . . the governing board *shall require* the making and delivery . . . of a written statement of information *in the following form*: . . . That ....., the organization on whose behalf he is making application . . . does not . . . advocate the overthrow of the Government . . . by force, violence, or other unlawful means, and that . . . it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States." (Emphasis added.) The emphasized words "shall require . . .in the following form" are mandatory on the school board and on the applicant. " 'Shall' is mandatory and 'may' is permissive." (Ed. Code, § 36, formerly § 19.) The section requires the applicant *to furnish the statement in this form,* without exception, and it was the refusal of the applicant to furnish the required statement that resulted in the denial of its application to use the school's "civic center." The requirement that the applicant shall deny in the required statement that the organization is one of those expressly mentioned therein bars the door, because the applicant cannot truthfully furnish the statement required, to every organization included in that portion of the quoted language. Thus if an organization does "advocate the overthrow of the Government . . . by force, violence, or other unlawful means" or is "a communist-action organization or communist-front organization required by law to be registered with the Attorney General," the governing

board, unless the applicant is willing to perjure himself, never reaches the decision required in the case of all other applicants by section 16564, since by the express terms of section 16565 the governing board "shall," i.e., "must," require the statement, which in such case cannot be truthfully made, before it can act upon the application to use the school property for the proposed meeting. The present statute thus has the same vice which caused us to strike down its predecessor section in Danskin. It closes the doors to public meetings of the proscribed organizations, while leaving them open to all others, even though the particular meeting may be for an entirely lawful purpose. It thus, somewhat more indirectly, prevents assembly and free speech in school buildings by certain organizations becauses it disapproves of the organizations and not because of what those organizations may intend to say or do therein. This is exactly the type of regulation held unconstitutional by us in Danskin and by the United States Supreme Court in De Jonge, *supra*.

Respondent suggests that a difference now exists between the facts and decisional law considered by this court in Danskin and by the United States Supreme Court in De Jonge (1) because it has since been determined by the Legislature and the Congress that the Communist Party is a continuing conspiracy to overthrow the Government of the United States and the State (Gov. Code, § 1027.5; 50 U.S.C.A. §§ 781, 841) and (2) because the scope of the clear and present

danger rule has been broadened and relaxed by later decisions of the United States Supreme Court.

Addressing ourselves to the second point, it is unnecessary again to review the development of the "clear and present danger" rule in the decisions of the United States Supreme Court up to the time that we decided Danskin, since we cited and quoted extensively from the cases in that court on this subject in the Danskin case. (28 Cal. 2d pp. 542-545.) It is argued that the rule as theretofore declared was broadened and relaxed in *Dennis v. United States,* 341 U.S. 494. But the true reach of Dennis can only be properly assessed by reading it in connection with *Yates v. United States,* 354 U.S. 298. The court in Yates at page 320 reiterates the well-established distinction, relied upon by us in Danskin, between "the advocacy and teaching of concrete action for the forcible overthrow of the Government" (which is not within the protection of the First Amendment) and "of principles divorced from action" (which falls within the First Amendment's protection). The court in Yates added: "The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that

mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in Dennis." (354 U.S. pp. 321-322.) Indeed, the very basis of the Yates holding was that mere proof of membership in the Communist Party *per se*, divorced from proof of "advocacy and teaching of concrete action for the forcible overthrow of the Government" is insufficient to support a conviction under the Smith Act. We can find no such broadening of the definition of the "clear and present danger rule" in Dennis as explained in Yates as to justify the exclusion of Communists and Communist-affiliates from the exercise of the rights of free speech and peaceable assembly for lawful purposes, or to lead to any logical conclusion that just because they are Communists or Communist-affiliates they will *per se* advocate and teach in a public meeting the concrete action of forcible overthrow of the Government if permitted to hold such public meeting in a school building.

The other argument, that the findings that the Communist Party constitutes a continuing conspiracy to overthrow the Government by force and violence justifies the exclusion from the use of school buildings of them and their affiliates, rests principally on the case

of *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382. In that case, in which only six of the nine justices participated, the court upheld the requirement of the Act of Congress (§ 9, subd. (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 159, subd. (h)) requiring each officer of a labor union to file with the National Labor Relations Board an affidavit that he is not a member of the Communist Party or affiliated with it, and does not believe in, and is not a member of nor supports any organization that believes in or teaches, the overthrow of the United States Government by force or any illegal or unconstitutional means, as a condition to recourse by the union to the board. A majority of the court upheld this requirement against the contention that it unconstitutionally infringed the right of such officers to freedom of speech (more properly, perhaps, the cognate right of freedom of association, see, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449) on the ground that Congress had enacted the provision to prevent "political strikes," and that this action was justified by evidence taken before a congressional committee "which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives . . . but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action." (339 U.S. p. 389.) Also "that Communist leaders of labor unions had in the past and would con-

tinue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government . . . some union leaders who hold to a belief in violent overthrow of the Government . . . likewise regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions which they control." (339 U.S. p. 388.) The court carefully pointed out at page 396 that the question of freedom of speech in that case was not directly, but only tangentially, involved, saying: "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the product of speech at all. Section 9 (h), in other words, does not interfere with speech because Congress fears the consequence of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs."

The inappositeness of this reasoning to the statute before us is clear. The very purpose which the court stated was not present in Douds is the only purpose of the Legislature here, to interfere, not tangentially for another legitimate purpose with speech, but to pre-

vent the speech itself. Moreover, the parallel claimed does not exist. In Douds the evidence before Congress established that strikes had been called by subversive union leaders solely for disruptive political purposes without regard to the union's welfare. The findings of Congress and our Legislature that the Communist Party is a continuing conspiracy etc. is not a parallel. It would only be parallel if Congress and the Legislature had found that Communists and Communist-affiliates had advocated or taught the concrete action of the violent and unlawful overthrow of the Government in public meetings. No such finding was made and we apprehend that no such finding could be supported by any substantial evidence. Indeed it is the essence of a *conspiracy*, such as was found, to operate in secrecy and not in the open light of day or in public meetings in schools or elsewhere.

Going to a broader consideration, giving regard to the purpose behind this legislation and giving section 16564 its full scope, without regard to the requirement that in order to secure consideration of its application at all, the applicant must deny all Communist affiliation, we would still be confronted with a serious constitutional question of the extent to which what amounts to a prior restraint on the exercise of the rights of free speech and assembly can properly go, and the factual basis necessary to the exercise of such prior restraint. That the power of respondent board to refuse the use of the school to an

applicant upon making the finding required by section 16564 amounts to a prior restraint is clear, since it forecloses the use of the school and prevents the applicant from *there* holding its meeting upon a prior determination of the board.

The rights of freedom of assembly and of speech guaranteed by the Constitution, like the cognate rights of freedon of the press and of petition, have a paramount and preferred place in our democratic system. As pointed out by Mr. Justice Rutledge in *Thomas v. Collins,* 323 U.S. 516, at page 530, "the usual presumption supporting legislatior is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." "That priority," he adds, "gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. (Citation.)

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the veil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have

clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedon in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."

Against the exercise of these paramount and preferred rights, the Legislature has attempted to set up a system of prior restraint. Upon a finding by the school board that the school's "civic center" *will be* used "for the commission of any act intended to further . . . the overthrow of the Government . . . by force, violence, or other unlawful means," the school board is empowered to deny the use of the center in advance. This amounts to a censorship in advance of the right to assembly and free speech upon the mere determination of a probability of its future misuse. Prior censorship upon such a prophetic finding can certainly only be justified, if at all, upon the clearest sort of showing that such misuse will with reasonable certainty occur. The state and the federal government can, as the federal government has done in the Smith Act, make the actual commission of such

acts criminal. It seems obvious that attempts at censorship by prior restraint should be more closely scrutinized to detect constitutional infirmity than such *post hoc* methods of restraint by criminal sanction. The danger of censorship in advance is that, in attempting to prevent the commission of forbidden acts in advance, it will also prevent lawful assemblies and the lawful exercise of free speech upon an erroneous (even if plausible) finding in advance that the applicant intends to engage in unlawful assembly and unlawful speech. In discussing the prior censorship of the exercise of the freedom of the press, the court said in *Lovell v. Griffin*, 303 U.S. 444, at page 451: "The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." (Emphasis the court's.) See the very extensive discussion of the whole subject of prior restraint in *Near v. Minnesota*, 283 U.S. 697, 713-723; cf. *Hague v. C.I.O.*, 307 U.S. 496, 516; *Schneider v. State*, 308 U.S. 147, 161 et seq.; *Thornhill v. Alabama*, 310 U.S. 88, 95-96; *Cantwell v. Connecticut*, 310 U.S. 296, 306.

It does not appear that disclosure of membership in the Communist Party or any of its affiliates or supporting organizations has a reasonable tendency to prove that the forbidden acts would be committed in a public meeting in a school building. The Dennis and Yates cases, the many congressional and legislative investigations, and the intensive and not always successful efforts of the F.B.I. to uncover subversion all teach us that acts of unlawful incitement when committed are secretly committed in carefully selected groups, not openly in public meetings. In Yates, for example, no criminal incitement was proved in any public meeting and no such criminal incitement was ever published in the Daily People's World. (See 354 U.S. pp. 331, 333.) We cannot escape the conclusion that the legislation under attack requires an unconstitutional disclosure and attempts to create an unconstitutional power of prior restraint upon the rights of free assembly and free speech. It has more than once been suggested that in the struggle against the Communist threat, we must be careful not to adopt the Communist methods lest we sacrifice our precious freedoms in the very effort to preserve them. We said in Danskin (28 Cal. 2d p. 554): "It may seem ironic that others who hold such beliefs" (i.e., the overthrow of government by violence) "may seek from the state the privilege of a public forum. But when the principles of free speech and peaceable assembly are at stake, the state has more to gain than to lose by a generous tolerance of the convictions and affiliations

of its many citizens so long as they present no clear and present danger to the community." In the balancing of the preferred rights of peaceable assembly and freedom of speech against the more than doubtful likelihood that Communists or Communist supporters would be so rash as to subject themselves to the certainty of criminal prosecution by committing "acts" in a public assembly proscribed by this statute, the balance should fall on the side of protecting the constitutionally guaranteed freedoms.

As appears from their petition for writ of mandate, petitioners sought monthly meeting dates in the Los Angeles school auditorium from January through June 1960. Since the June date has now passed, the question arises as to whether the proceeding presents issues that should be judicially determined: as a guide for such future applications as might be made for the school premises; for the settlement of public questions necessarily involved; and because of the unlikelihood that a final judicial decision could ever be made within the limited time of a series of proposed meeting dates. To overcome the effect of the expiration of the June date, petitioners inform us that they have in fact made another application for a new series of monthly meeting dates at the John Burroughs Junior High School from October 1960 through June 1961.

Petitioners rely on *Rattray v. Scudder*, 67 Cal. App. 2d 123, where mandate was sought directing the Real Estate Commissioner to set aside an order revok-

ing a real estate broker's license. The superior court directed the issuance of the writ and awarded costs to petitioner. The Real Estate Commissioner appealed. After the writ was issued but before the hearing on appeal, the term of the license had expired. The licensee moved to dismiss the appeal as moot. In denying the motion, the court said: "As a practical matter this judgment (for issuance of the writ), if allowed to stand, will have a direct bearing and real effect upon any renewal of the respondent's license. . . . Moreover, important public questions are involved both directly, with respect to this judgment, and indirectly, through the effect on future appeals in such cases which could not be determined before the license in question had expired." (67 Cal. App. 2d p. 128.)

We are satisfied that we should not treat the question as moot, and that petitioner's continuing right to make application for the use of the school facilities for their meetings is properly at issue.

In view of our conclusions herein expressed, other points urged by petitioners need not be considered.

Let a peremptory writ of mandate issue directing respondent to act upon any pending or future application by petitioners to be allowed to hold a public meeting or meetings in the John Burroughs Junior High School Auditorium without requiring from pe-

titioners a "Statement of Information" in the form prescribed by section 16565 of the Education Code.

DOOLING, J.

WE CONCUR:

GIBSON, C. J.
TRAYNOR, J.
PETERS, J.

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California Corporation; REV. JOHN R. CLARK, HARVEY FURGATCH, DR. HARRY RUJA, JOHN W. HAMBURG and IRWIN GOSTIN, *Petitioners,* vs. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO, *Respondent.*	L. A. 25789

Petitioners seek a writ of mandate to compel the Board of Education of the City of San Diego to grant their application for the use of certain school buildings in San Diego in which to hold a series of monthly public meetings on the general theme of "Civil Liberties and the Constitution." As in the companion Los Angeles School Board case (L.A. 25788, ante p.), petitioners refused to furnish the required "Statement of Information" (Ed. Code § 16565) and the board denied petitioners' use of the requested school premises.

The questions presented are identical with those presented in the Los Angeles case, and the disposition should be the same.

Let a peremptory writ of mandate issue directing respondent to act upon any pending or future application by petitioners to be allowed to hold a public meeting or meetings in any of the school buildings described in the petition without requiring from petitioners a "Statement of Information" in the form prescribed by section 16565 of the Education Code.

DOOLING, J.

WE CONCUR:

GIBSON, C. J.
TRAYNOR, J.
PETERS, J.

APPENDIX "B"

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

L. A. 25788

DISSENTING OPINION

I dissent.

We are here confronted with the simple question of whether the Legislature may ordain that those who seek permission to use our public schools, erected primarily for educational purposes, may be required as a condition to the enjoyment of such use to declare that the school property will not be used for the commission of any *act* intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States or of the State of California by force, violence or other unlawful means, and that to the best of the applicant's knowledge, the organization he represents is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. To deny school boards the right to make this inquiry is a radical departure from what this court held in *Payroll Guar. Assn. v. Board of Education*, 27 Cal. 2d 197

wherein at page 200 it said "The respondent board may not only make reasonable regulations with regard to the use of the school auditorium for authorized purposes but may deny an application for its use if (1) such use would further, directly or indirectly, the overthrow of the present government of the United States or any State, Territory or Possession thereof, by force or violence or other unlawful means, ..." And again in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, 553-554, we said "The state must be on the alert for any clear and present danger to the community, *sensitive to the warning signals,* the ambiance in which a forum is planned, the atmosphere that envelops it. *It cannot look with equanimity upon those whose words or actions have already left in their wake a trail of violence.*

"Always it must distinguish, however, between speech, no matter how unorthodox, that remains on a theoretical plane, *and speech, no matter how skillfully intoned that creates a clear and present danger to the community.*" (Emphasis added.)

The statutes here in question are designed to protect the people not against what communists or kindred ~~subversive~~ organizations or individuals advocate or believe, but against what the Legislature has considered they *have done* and are *likely* to do again. Conceding that restriction on speech and assembly cannot be sustained unless the evil itself is "substan-

tial" and "relatively serious," or sometimes "extremely serious" thus creating what is commonly called "clear and present danger," nevertheless, as was said in *Dennis v. United States*, 341 U.S. 494, 509 [71 S. Ct. 857, 95 L.Ed. 1137], "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, *for if a society cannot protect its very structure from armed internal attack*, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish.

"*Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.* The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though

doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of probability of success, or the immediacy of a successful attempt." (Emphasis added.)

The majority opinion places its imprimatur upon a decision that holds that the people of the State of California must open their schools as forums wherein groups aiming at the destruction of the federal and state governments by force and violence may assemble and wherein those in attendance may be indoctrinated with that philosophy in preparation for future violent action. With this I cannot agree. "It has been established by legislative findings and judicial decisions that the Communist Party is a continuing conspiracy against our government. (Citations.)" *(Board of Education v. Mass,* 47 Cal. 2d 494, 497-498.) And the Legislature has declared that "communism is a political theory that the presently existing form of government of the United States or of this State shall be changed by force, violence, or other unconstitutional means, to a totalitarian dictatorship.[1] . . . ." (Ed. Code. § 8275.)

[1]The Legislature of this state made the following finding in 1953 with respect to the world communism movement:

"(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law.

The legislation with which we are here concerned does not restrain speech or assembly as such. Its manifest objective is the protection of our public schools from the commission of subversive acts therein, and asks the applicant for use of our school buildings only to state under oath that "To the best of his knowledge" the school property will not be used ". . . to further any program or movement, the purpose of which is to accomplish the overthrow of the government of the United States or of the state by force, violence, or other unlawful means. . . " Unless the applicant has knowledge that the school property is to be used for the advocacy of subversive acts, what other reason would serve to deter him from signing the Statement of Information? History, even in our times warns us

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"(b) This world-wide revolutionary movement is predicated upon and it is designed and intended to carry into execution the basic precepts of communism as expounded by Marx, Lenin, and Stalin.

"(c) Pursuant to the objectives of the world communism movement, in numerous foreign countries the legally constituted governments have been overthrown and totalitarian dictatorships established therein against the will of the people, and the establishment of similar dictatorships in other countries is imminently threatening. The successful establishment of totalitarian dictatorships has consistently been aided, accompanied, or accomplished by repeated acts of treachery, deceit, teaching of false doctrines, teaching untruth, together with organized confusion, insubordination, and disloyalty, fostered, directed, instigated, or employed by communist organizations and their members in such countries.

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with and endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement.

"(e) One of the objectives of the world communism movement is to place its members in state and local government positions and in state supported educational institutions. If this objective is successful, propaganda can be dis-

that eternal vigilance is still the price of liberty and that a free people must not wait until "the plans have been laid and the signal is awaited" for violent action before taking steps to prevent the fruition of subversive propaganda. The statutes now engaging our attention do not proscribe the advocacy of abstract doctrine but are aimed at the teaching of concrete action for the *forcible* overthrow of the government. It therefore does no violence to due process nor to the principles enunciated by this court in the Danskin case, *supra,* relied upon by the majority opinion.

The statutes with which we are here confronted represent an effort by the Legislature of California to prevent the public school buildings in this state from be-

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seminated by the members of these organizations among pupils and students by those members who would have the opportunity to teach them and to whom, as teachers, they would look for guidance, authority, and leadership. The members of such groups would use their positions to advocate and teach their doctrines and teach the prescribed Communist Party line group dogma or doctrine without regard to truth of free inquiry. This type of propaganda is sufficiently subtle to escape detection.

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enfore the laws of the State of California and their members will infiltrate and seek employment by the State and its public agencies." (Gov. Code, § 1027.5.)

The Congress of the United States, in adopting the Internal Security Act of 1950, declared the dangers of the Communist movement in the following terms (Act of Sept. 23, 1950, ch. 1024, tit. I, § 2, 64 Stats. 987; 50 U.S.C.A. § 781):

"As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

"(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

coming forums for the propagation and advocacy of *acts* of subversion, or *acts* intended to support subversive elements. This is well within the recognized right of government to protect itself from all enemies —domestic as well as foreign.

For the foregoing as well as the additional reasons advanced by Mr. Presiding Justice Fox, speaking for a unanimous court when this cause was pending before the District Court of Appeal, Second Appellate District, Division Two (*American Civil Liberties Union of So. Calif. v. Board of Education*, 5 Cal. Rptr. 215), I would discharge the alternative writ and deny the petition for a peremptory writ of mandate.

WHITE, J.

More recently, in adopting the Communist Control Act of 1954 (Public Law 637, ch. 886, 68 Stats. 775), our Congress expressed its awareness of the true nature of the Communist Party program and methods in the following findings:

"Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . ." and "The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its members, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States."

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

L. A. 25788

DISSENTING OPINION OF SCHAUER, J. TO OPINION OF DOOLING, J.

I concur in the reasoning and conclusions of Justice White and also am in full accord with, and by reference adopt, the opinion prepared for the District Court of Appeal (when this case was before that court, reported in 5 Cal. Rptr. 215) by Presiding Justice Fox and concurred in by Justice Ashburn and Justice pro tempore Kincaid. For all of the reasons enunciated by Justices White, Fox, Ashburn and Kincaid the alternative writ should be discharged and the petition denied.

SCHAUER, J.

I CONCUR:

McCOMB, J.

EXHIBIT "B"

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO

L. A. 25789

DISSENTING OPINION

I dissent.

Upon the grounds and for the reasons stated in my dissenting opinion in *American Civil Liberties Union of Southern California, a California Corporation; Eason Monroe, Director and Willard Carpenter, Associate Director, Petitioners, v. Board of Education of the City of Los Angeles,* Respondent, L. A. 25788, this day filed, *ante* p.——, I would discharge the alternative writ and deny the petition for a peremptory writ of mandate.

WHITE, J.

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO

L, A. 25789

DISSENTING OPINION OF SCHAUER, J. TO OPINION OF DOOLING, J.

For the reasons stated in the dissenting opinion of Justice White in *American Civil Liberties Union v. Board of Education of the City of Los Angeles, ante,* p.——, and for the reasons stated in the opinion of Presiding Justice Fox, concurred in by Justice Ashburn and Justice pro tempore Kincaid, when that case was before the District Court of Appeal (reported in 5 Cal. Rptr. 215), I would discharge the alternative writ and deny the petition for a peremptory writ of mandate.

SCHAUER, J.

I Concur:

McCOMB, J.

APPENDIX "C"

[Civil No. 24573. Second Dist., Div. Two. May 24, 1960.]

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Respondent.

PROCEEDING in mandamus to compel the Board of Education of the City of Los Angeles to grant an application for use of certain public school buildings in which to hold public meetings. Writ denied.

A. L. Wirin and Abraham Gorenfeld for Petitioners.

Harold W. Kennedy, County Counsel, and Ronald L. Schneider, Deputy County Counsel, for Respondent.

FOX, P. J.—Petitioners seek a writ of mandate to compel the Board of Education of the City of Los Angeles to grant their application for the use of certain public school buildings in which to hold a series of monthly meetings which would be open to the public.

Petitioners' application for the use of school buildings was denied by respondent board because petitioners failed and refused to make and deliver to the board a written "Statement of Information" as required by section 16565 of the Education Code, which implements section 16564 of the same code (for-

merly, §§ 19440 and 19441). The pertinent portion of the latter section reads:

"Any use, by an individual, society, group, or organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered." The material portions of the implementing section (§ 16565), which includes the required statement of information, provide:

"No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.

"For the purpose of determination by such governing board whether or not any individual, society, group or organization applying for the use of such school property intends to violate Section 16564, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

STATEMENT OF INFORMATION

"The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish

the overthrow of the Government of the United States by force, violence or other unlawful means;

"That ..... , the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California, by force, violence, or other unlawful means, and that, to the best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

....

Signature

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made would not violate Section 16564 of the Education Code."

Petitioners' refusal to furnish the statement of information was based on the ground that the requirement to furnish such information violated their rights and liberties under the Constitutions of both the United States and the State of California.

At the outset we must determine the meaning and purpose of the above quoted sections of the Education Code. This may readily be ascertained by con-

sidering together the quoted portion of section 16564 and the first paragraph of section 16565, also quoted, *supra*. When so considered, it is clear that the effect of these two sections is to place every school board under a legislative mandate not to permit any "individual, society, group or organization" to make "any use" of school property "*for the commission of any act* intended to further any program or movement the purpose of which is to accomplish the overthrow" of either the federal or state government by force, violence or other unlawful means. By these sections the legislature has declared that school buildings shall neither be used for the commission of subversive acts nor acts in furtherance of any movement that has for its objective subversive results. It will be noted that these sections prohibit the use of school buildings for the commission of *acts* as distinguished from the mere academic discussion of revolutionary doctrine.

The second paragraph of section 16565 implements the foregoing legislative intent by providing for the submission to the school board of the required "Statement of Information" upon which the board may determine in advance whether or not the proscribed *acts* are contemplated by the applicant. The first paragraph of the "Statement of Information" requires the applicant to state (under penalty of perjury) that "to the best of his knowledge" no use will be made of the school property "for the commission of any act in-

tended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence, or other unlawful means." This paragraph follows substantially the wording of the first paragraph of section 16564. As we have said, such language concerns itself only with acts of subversion or acts intended to further the purposes of any subversive element. The second paragraph of the "Statement of Information" requires that the applicant state that, "to the best of his knowledge" the organization he represents does not "advocate" the violent overthrow of the federal or state governments and that it is not a "communist-action" or "communist-front" organization "required by law to be registered with the Attorney General of the United States." The deliberate use of the word "advocate" has, in this context, a very narrow meaning. The present statute was adopted by the Legislature subsequent to a decision by the Supreme Court of this state which held unconstitutional a statute prohibiting the use of school property by any person or group having as its "object" the overthrow, or the "advocacy" of the overthrow, of the federal or state governments by violence. (*Danskin v. San Diego Unified School District*, 28 Cal. 2d 536.) The court viewed the term "advocacy" in its broad sense; i.e., the mere expression of political philosophy and doctrines in the public forum. We must assume that sections 16564 and 16565 were deliber-

ately formulated to comply with the pronouncements and holding of the court in the Danskin case. With this in mind, we must determine the meaning which the term "advocate" has acquired since the year 1946 when the Danskin case was decided.

"Advocacy" is no longer a general term meaning dissemination of doctrines and philosophical concepts in the market place of ideas. It has become a word of art with a narrow and strictly confined meaning when used in relation to the proscription of subversive and revolutionary activities. The case of *Yates v. United States,* 354 U.S. 298 decided in 1957, is apposite. Mr. Justice Harlan, speaking for the majority, in construing the term "advocate" as deliberately used by Congress in the Smith Act, stated: " . . . our first duty is to construe this statute [18 U.S.C. §§ 371, 2385]. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation. (Citations.) . . . beyond all question . . . Congress was aware of the distinction between advocacy or teaching of abstract doctrine and the *advocacy* or teaching of *action,* and . . . it did not intend to disregard it. *The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of*

principles divorced from action." (354 U.S. at 319, 320.) (Emphasis added.) See also *Dennis v. United States,* 341 U.S. 494, wherein "advocacy" and "discussions" were similarly distinguished.

Therefore, we hold that the term "advocate the overthrow of the Government" in the "Statement of Information" was deliberately used by the Legislature in the narrow sense defined so explicitly in the Yates case. The Legislature may not be assumed to have enacted a useless and unconstitutional provision in the face of the peremptory commands of the Danskin decision. Thus, the purposes of section 16564 are properly served by this portion of the "Statement of Information," in that an organization which advocates the overthrow of the Government is an organization which is very likely to commit acts toward that end.

The last part of the second paragraph of the "Statement of Information" refers to "communist-front" and "communist-action" organizations required to register with the Attorney General of the United States. Again this information implements the intent and purpose of section 16564. The sole interest of the school board is to determine in advance whether acts of subversion will or will not be committed on school premises by the applicant in question. If the applicant is a "communist-front" or "communist-action"

organization, the likelihood of such a group committing acts tending to further its own interests is substantial. Furthermore, "it has been established by legislative findings and judicial decisions that the Communist Party is a continuing conspiracy against our government. (Citations.)" (*Board of Education v. Mass* (1956), 47 Cal. 2d 494, 497-498.) And the legislature has declared that "communism is a political theory that the presently existing form of government of the United States or of this state shall be changed, by force, violence or other unconstitutional means, to a totalitarian dictatorship.[1] . . ." (Ed. Code § 8275, enacted 1951.)

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[1]The Legislature of this state made the following finding in 1953 with respect to the world communism movement:

"(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law.

"(b) This world-wide revolutionary movement is predicated upon and it is designed and intended to carry into execution the basic precepts of communism as expounded by Marx, Lenin, and Stalin.

"(c) Pursuant to the objectives of the world communism movement in numerous foreign countries the legally constituted governments have been overthrown and totalitarian dictatorships established therein against the will of the people, and the establishment of similar dictatorships in other countries is imminently threatening. The successful establishment of totalitarian dictatorships has consistently been aided, accompanied, or accomplished by repeated acts of treachery, deceit, teaching of false doctrines, teaching untruth, together with organized confusion, insubordination, and disloyalty, fostered, directed, instigated, or employed by communist organizations and their members in such countries.

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with and endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement.

"(3) One of the objectives of the world communist movement is to place its members in state and local government positions and in state supported

It is eminently clear that any communist group would be within the proscribed class as defined by section 16565. Such information is therefore vital to a determination by the school board as to whether or not the intended use of school property will be in violation of section 16564.

Petitioners first contend that the "Statement of Information," required of all applicants who desire to make use of public school property, is an unconstitutional infringement of their rights of free speech and assembly under the First Amendment to the Constitution of the United States and as guaranteed by the California Constitution. They rely principally upon *Danskin v. San Diego Unified School District, supra.*

The statute held unconstitutional in the Danskin case (Ed. Code, § 19432) read as follows: "Any use,

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educational institutions. If this objective is successful, propaganda can be disseminated by the members of these organizations among pupils and students by those members who would have the opportunity to teach them and to whom, as teachers, they would look for guidance, authority, and leadership. The members of such groups would use their positions to advocate and teach their doctrines and teach the prescribed Communist Party line group dogma or doctrine without regard to truth or free inquiry. This type of propaganda is sufficiently subtle to escape detection.

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, resist, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California and their members will infiltrate and seek employment by the State and its public agencies." (Gov. Code, § 1027.5.)

The Congress of the United States, in adopting the Internal Security Act of 1950, declared the dangers of the Communist movement in the following terms (Act of Sept. 23, 1950, ch. 1024, tit. I, § 2, 64 Stats. 987; 50 U.S.C.A. § 781):

As a result of evidence adduced before various committees of the Senate and House of Represntatives, the Congress finds that

by any individual, society, group, or organization which has as its object or as one of its objects, or is affiliated with any group, society or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means shall not be granted, permitted, or suffered.

"Any person who is affiliated with any organization, which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof by force or violence or other unlawful means, or any organization of persons which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof,

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"(1) There exists a world Communist movement which in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

More recently, in adopting the Communist Control Act of 1954 (Public Law 637, ch. 886), our Congress expressed its awareness of the true nature of the Communist Party program and methods in the following findings:

"Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . ." and "The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States."

by force or violence or other unlawful means, is hereby declared to be and is characterized, a subversive element.

"Notwithstanding any of the other terms of this chapter, no such governing board shall grant the use of any school property to any person or organization who or which is a subversive element as herein defined.

"For the purpose of determination by such governing board whether or not such person or such organization of persons applying for the use of such school property, is a subversive element as herein defined, such governing board may require the making and delivery to such governing board, by such person or any members of such organization, of affidavits in form prescribed by such governing board, stating facts showing whether or not such person or organization is a subversive element as herein defined.

"Reference is hereby made to the provision of law relating to perjury and the punishment therefor shall be applicable to persons making and delivering affidavits provided for under the provisions of this chapter."

In compliance with the above, the San Diego School Board required the petitioners to subscribe to the following oath:

"I, ... being first duly sworn, on oath say:

"I am a member of the San Diego Civil Liberties Committee affiliated with the Southern California Branch of the American Civil Liberties Union and one of the applicants for the use of Roosevelt Junior High School auditorium for a series of meetings on January 25th, February 22nd, March 22nd, April 26th, May 24th, and June 28, 1946.

"I do not advocate and I am not affiliated with any organization which advocates or has as its object or one of its objects the overthrow of the present Government of the United States or of any State by force or violence, or other unlawful means." The validity of the oath requirement was held to depend upon the validity of section 19432 of the Education Code. The court held that section 19432 was invalid on its face as being in violation of the First and Fourteenth Amendments of the Constitution of the United States and of the guarantees of freedom of speech and assembly in the Constitution of California.

The ultimate reason for striking down this statute was the Supreme Court's view that it made "convictions and affiliations a condition of free speech" and that such a restriction "is striking at something less than clear and present danger." (28 Cal.2d 544.) Two distinctions between the Danskin case and the instant situation are immediately apparent. In *Danskin*, the statute involved only beliefs and convictions, not *acts* as in present sections 16564 and 16565. Moreover,

there has been a substantial change in the rule of "clear and present danger" as that phrase has since been interpreted and applied by the Supreme Court of the United States.

We first consider the requirement of the present statute that the use of public school buildings be denied to those individuals and groups which contemplate *acts* of subversion or *acts* intended to further the purposes of subversive organizations. This language contemplates more than mere "prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." (*Schneiderman v. United States,* 320 U.S. 118, 157-158, quoted with approval in *Danskin v. San Diego Unified School District, supra.)* No does the statute here under consideration "compel 'subversive elements' directly to renounce their convictions and affiliations." (*Danskin v. San Diego Unified School District, supra,* p. 546) or abridge "the ancient right to free speech" by denying "access to a forum in a school building to 'subversive elements' . . . because [the legislature] believes the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate." (28 Cal.2d p. 545.)

On the contrary, this statute denies access to school property to those who would use the property as a place in which to commit *acts* of subversion or treason

or acts tending to further the cause of subversion and treason by direct support to organizations having such results as their principal object. An "act" as opposed to an academic argument creates the crucial difference between the present sections and the one held unconstitutional in the *Danskin* case. Argument may be countered by argument but an act is an accomplished fact. An act by definition is the application of force which accomplishes a *result,* though it may fall short of its intended objective. Obviously, the Legislature is concerned with the *results* of acts of subversion for therein lies the threat to our free, democratic society. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held *but as to its purpose;* not as to the relations of the speakers, *but whether their utterances transcend the bounds of the freedon of speech which the Constitution protects."* *(DeJonge v. Oregon,* 299 U.S. 353, 365.) Emphasis added,) Moreover, "there is a material difference between agitation and exhortation calling for present violent action . . . and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time." *(Schneiderman v. United States, supra,* p. 157.) *A fortiori,* if, instead of *speech* intended to incite rebellion and treason (which would be one of the *acts* proscribed by the statute) the applicant intended to *commit other overt acts* of subversion or acts intended to further

subversive interests, the intended use could not be entitled to the protection of the constitutional freedoms.

Thus the distinction in this regard between the Danskin case and the instant matter is clear. The prior statute forbade the use of schools to "subversive elements" even though the assembly was to be lawfully conducted and no *acts* of subversion were contemplated. Under the present statute, only *acts* are proscribed.

The second distinguishing feature between this case and the Danskin decision is the marked change in the "clear and present danger" doctrine (originally enunciated in *Schenck v. United States,* 249 U.S. 47, 52. Our Supreme Court relied principally on the holding of the United States Supreme Court in *Bridges v. California,* 314 U.S. 252, in determining that the statute in the *Danskin* case forbade activities which did not constitute a "clear and present danger" of bringing about "substantive evils." The *Bridges* court, quoting from Chief Justice Hughes' dissent in *Abrams v. United States,* 250 U.S. 616, 630, said: "'We should be eternally vigilant against attempts to check the expressions of opinions that we loath and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*'" Again, the *Bridges* court quoted Mr. Justice Brandeis' dissent in *Whitney v. California,* 274 U.S. 357, 376: "'To justify suppression of free

speech *there must be reasonable ground to fear that evil will result* if free speech is practiced. *There must be reasonable ground to believe that the danger apprehended is imminent.'"* (Emphasis the Supreme Court's.) The key word in these quotations is the word "imminent." The reasoning seems to be that no action abridging the free speech of subversive groups may be taken until the revolution has been planned and the moment to strike is awaited by armed terrorists. Until that moment, the danger is not an imminent one; and there is still a chance that the terrorists and the revolutionists will have a change of heart because they have participated in a free exchange of ideas in the public forum.

The impracticability of this notion is beyond comprehension and is reminiscent of the disaster at Pearl Harbor and the infiltration and ultimate subjugation of the Eastern European countries by the communists since World War II. Fortunately, the *Bridges* definition of "clear and present danger" is not in harmony with the more recent decisions. The modern interpretation is found in *American Communications Assn. v. Douds,* 339 U.S. 382 and *Dennis v. United States,* 341 U.S. 494.

In the Douds case, the court held constitutional section 9(h) of the Labor Management Relations Act (29 U.S.C., §159 (h)), which, as a condition of a labor union's utilizing the privileges afforded by the act,

requires its officers to file a non-communist affidavit with the National Labor Relations Board. The court held that "political strikes" were the substantive evil at which section 9(h) was aimed and that such strikes were a legitimate interest of Congress under the Commerce power. Discussing the question of whether or not the possibility of political strikes called by communist labor leaders constitutes a "clear and present danger," the court said: "The Board does not contend that political strikes, the substantive evil at which section 9(h) is aimed, are the *present* or *impending* products of advocacy of the doctrines of communism or the expression of belief in overthrow of government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so *without* advocacy [emphasis the court's] or persuasion that seeks acceptance in the competition of the market. Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, *unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education . . . But force may and must be met with force.* Section 9 (h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded *they have done* and are *likely* to do again." (339 U.S. at p. 396.) Emphasis ours except where indicated.) The petitioner argued, however, that the court must find a clear and

present danger to the security of the nation or of widespread industrial strife in order to sustain section 9(h). In answer to this contention, the court said, at page 397: [Since the *Schenck* case] this court has decided that *however* great the likelihood that a substantive evil will result, restrictions on speech and press cannot be sustained unless the evil itself is 'substantial' and 'relatively serious' (citation), or sometimes 'extremely serious.' (Citation.) . . . But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this court to lay down an *absolutist test* measured in terms of danger to the Nation. When the *effect* of a statute or ordinance upon the exercise of First Amendment freedoms is *relatively small* and the *public interest to be protected is substantial,* it is obvious that a rigid test requiring a showing of *imminent danger* to the security of the Nation is an absurdity." (Emphasis added.) In considering recent cases involving application of the doctrine, the court said: "And recent cases in this court involving contempt by publication likewise have no meaning if *imminent danger of national peril* is the criterion." (339 U.S. at p. 398.) (Emphasis added.)

The present rule or "test" is enunciated in the Dennis case. The court recognized that the validity of the Smith Act depended upon the meaning of the phrase "clear and present danger." "Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the putsch

is about to be executed, the plans have been laid and the signal is awaited. . . . Certainly an attempt to overthrow the Government by force even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The danger which such *attempts* create both physically and politically to a nation makes it impossible to measure the validity in terms of the *probability of success*, or the *immediacy of a successful attempt*." (341 U.S. at p. 509.) (Emphasis added.) Since "imminent" peril or "immediacy of a successful attempt" is not the proper criterion to apply, the court enunciated the real test, using the language of Judge Learned Hand in *United States v. Dennis*, 183 F.2d 201, at page 212: " 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' (Citation.) We adopt this statement as the rule." (341 U.S. at 510.)

We are therefore required to proceed to a determination of whether or not a "clear and present danger" exists against which the Legislature of this state has the right, duty and power to protect the citizens of this state, even though certain rights of free speech and assembly may be thereby impinged, and whether sections 16564 and 16565 of the Education Code accomplish this end in a legitimate manner. We must first determine the relative importance of the rights to be protected; on the one hand, the gravity of the evil

against which protection is sought, and on the other hand, the scope of the restrictions on speech and assembly which the present statute seeks to impose. If the danger is great and the restriction on constitutional freedom is slight, the probability of the occurrence of the substantive evil is not a substantial factor. This is the principle of the Douds case. However, if the restricted rights involve a large segment of the citizenry or seriously impair the rights of a few, we must apply the rule in the Dennis case; i.e., "the gravity of the 'evil,' discounted by its improbability." In no event are we required to find an "imminent" or impending peril in order to find the existence of a "clear and present danger." The *Danskin* court, on the other hand, applied the "imminency" test in reaching its decision for that was the rule in 1946, before the Douds case in 1949 and the Dennis case in 1950. For this further reason, the Danskin case is not controlling in the present controversy.

We have concluded that under the rule of either the Douds or Dennis cases, the statute in question protects against a "clear and present danger" and that infringements of free speech and assembly flowing from its application are therefore proper and do not render it unconstitutional. Applying the Douds rule to the challenged sections, the immediate question is: What evil is sought to be abated? The answer is simple. The Legislature, through this statute, seeks to protect the people of this state from the commission in public

school buildings of acts of subversion or acts intended to support subversive elements. An act of subversion is, in and of itself, an "evil" of a "substantive" or "grave" nature, and acts intended to support subversive elements are no less "evil." That the public school buildings of this state should be used as the spawning ground of violence and terrorism is repugnant to every ideal of freedom-loving people. It is the antithesis of the democratic principles which our public schools are designed to foster and perpetuate.

Conversely, the only rights of free speech and assembly which are denied by this statute are denied to those persons or groups which intend to use our school buildings for the proscribed acts and only incidentally for the promulgation of ideas. The controlling fact is that such subversive elements, especially the communists, have been found by the Legislature to have as their primary purpose, the violent overthrow of our form of government and the eventual subjugation of the people of this State and Nation to the will of the Kremlin. The grave danger that acts of subversion or acts calculated to support subversive elements will be committed by communists and others of like ilk, leads inescapably to the conclusion that they must be barrer from the use of school property in order to guarantee that the schools will not be used as a convenient "community center" of subversive activity.

Thus the total effect of the statute to bar the doors of our schools to those who would subvert our liberties,

The restriction is slight and the danger grave. Thus, under the Douds case, the clear and present danger test has been successfully met by this legislation.

We next consider the challengd statute in the light of the rule of "clear and present danger" laid down in the Dennis case. As the rule is paraphrased by our Supreme Court in *Katzev v. County of Los Angeles,* 52 Cal.2d 360, 366, we must determine "whether the gravity of any such 'evil' discounted by its improbability, 'justifies' invasion of freedom of speech in order to avoid the 'danger.' "

The substantive evil at which the statute is aimed is acts; acts of subversion or acts intended to further subversive interests, committed within public school buildings. That such acts constitute the highest order of threat to our free society is obvious. Moreover, the fact that an organization intends to commit such acts makes the likelihood of their occurrence a near certainty. Thus the test of the Dennis case is thoroughly satisfied; a grave evil which is almost certain to occur but for the prohibitions of the statute.

The provisions of the "Statement of Information" clearly implement the objectives of the statute within the constitutional limitations of the "clear and present danger" doctrine. If an organization intends to commit the proscribed acts, advocates the overthrow of the government or is required by law to be registered with the Attorney General of the United States, it is

highly probable that such organization *will* commit the proscribed acts. Petitioners argue, however, that the mere requirement of registration with the Attorney General is not sufficient to raise such a probability. The answer to this contention is found in the registration statute itself. (Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. §§ 781-798.) This statute requires the registration of all "communist-front" or "communist-action" organizations with the Attorney General of the United States. (50 U.S.C. §786.) A "communist-action" organization is defined as one "which is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and operates primarily to advance the objectives of such world Communist movement . . ." (50 U.S.C. §782.) A "communist-front" organization is one which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement. . . ." (50 U.S.C. §782.)

The objectives and practices of world Communism are disclosed and found as facts in 50 United States Code, section 781 and in The Communist Control Act of 1954, both quoted in part in the margin, *supra*, and by our own Legislature in section 1027.5 of the Government Code, also quoted *supra* in the margin. Thus by

definition, a "communist-front" or "communist-action" organization is dedicated to the future overthrow of our government and to the commission, at every opportunity, of acts intended to further such purpose. The relevant fact required to be disclosed by the "Statement of Information" is that the organization for which application is made is *not* a "communist-front" or "communist-action" organization required *by law* to be registered with the Attorney General of the United States. The applicant is only required to state, to the best of his knowledge and belief, that the organization does not fall within the definition of a "Communist-action" or "Communist-front" organization established by the Internal Security Act (50 U.S.C. § 782, *supra*). The fact that the organization is or is not so registered is immaterial. The only fact required to be stated is that the organization is not required *by law* to register, i.e., does not fall within the above definition.

Obviously, a "communist-front" or "communist-action" organization which falls into the above definition, constitutes a direct threat of affirmative, subversive action. It is clear that the Legislature, in referring to such organizations, considered that they constitute groups dedicated to the violent overthrow of the governments of the state and nation. No other meaning may be gleaned from the registration statute set out above. A foreign controlled, communist group which has as its object the violent overthrow of our government is per se, an organization likely to commit acts of

subversion or acts intended to further its own subversive interests or the interests of related subversive groups. Therefore, any applicant who cannot truthfully sign the "Statement of Information" presumably represents an organization which is likely to commit the proscribed *acts*, and it is immaterial whether he cannot truthfully swear to the entire "Statement" or only a part thereof. All of the required information is vital to an advance determination by the school board as to whether or not the *acts* will be committed, and the "Statement of Information" is not defective by reason of reference to groups which "advocate" the overthrow of the Government or to "communist-front" and "communist-action" organizations.

Additionally, petitioners urge three further grounds of unconstitutionality with respect to sections 16564 and 16565: (1) That the language of the sections is vague and uncertain; (2) that they conflict with Congressional enactments which occupy the field; and (3) that they violate due process.

As to (1) above, an examination of the challenged sections discloses certain key words and phrases, which, if their meaning is clear, add certainty to the requirements contained therein. In section 16564, the key phrase is "acts intended to further any program or movement the purpose of which" is the violent overthrow of the government. The questions are: (1) What is such an "act"; and (2) Is the meaning of the word "act" sufficiently definite?

We have previously construed the word "act" to mean any act of subversion (which obviously would be intended to further the interests of the subversive elements in our midst) or any act intended to further the interest of subversives. The statute means exactly what it says: *any act.* We are not required to enumerate the various acts which would fall into this classification for they range from fund raising, through recruiting and advocacy of immediate overthrow of the government, to the distribution of arms and ammunition. If the act furthers the purposes or is intended to further the purposes of subversives, it is proscribed, no matter how innocuous it might be if considered out of context with the major evil at which the statute is aimed. It should be here carefully noted that we are not passing on the definiteness or certainty of section 16564 insofar as that section constitutes a criminal sanction. The second paragraph makes the commission of the proscribed acts a misdemeanor but it is not before us on this petition, and we are thus not required to consider its constitutionality.

Thus the word "act" as found in section 16564 has a sufficiently definite meaning and a fortiori, a definite meaning as used in section 16565 in the "Statement of Information." In the latter section, the "Statement" requires that the applicant state "*to the best of his knowledge*": (1) That no "act" (as above defined) will be committed in the public school property; (2) that the organization which he represents does not ad-

vocate (as herein explained) the overthrow of the government by force; and (3) that it is not a communist-action or communist-front organization required to be registered with the Attorney General of the United States. The first requested information is in substantially the same language as section 16564 and is sufficiently definite. The second fact relates to advocacy, and, as we have said, advocacy has aquired a definite meaning, i.e., the inciting of others to immediate action or to action as soon as is practicable. The applicant is thus only required to state that the organization which he represents does not, to the best of his knowledge, advocate the violent overthrow of the government. This too, is clear. The third required fact relates to communist groups required to be registered with the Attorney General. The provisions requiring such registration are clearly set out in the Federal statute as we have previously pointed out. The applicant is only required to state, in effect, that, if any of the facts called for by the "Statement" apply to his organization or to the use which will be made of the school property, he does not know of such facts of his own knowledge. The meaning of the statute is sufficiently clear to provide a definite basis upon which the signing member or individual may evaluate the information at his disposal to the end that he may determine whether any of the facts called for apply to his situation.

The Supreme Court of the United States rejected the argument of vagueness in *Barenblatt v. United*

States, 360 U.S. 109. In that case, the petitioner's conviction for contempt of Congress was upheld. The petitioner had refused to answer questions regarding his Communist Party affiliations put to him by a subcommittee of the House Committee on Un-American Activities during the course of an inquiry concerning alleged Communist infiltration into the education field. The authority of the sub-committee was challenged on the ground that the investigative authority conferred on the subcommittee by Congress was vague and uncertain. The authority was granted by rule XI, paragraph 17 (b), H Res 5, 83 Cong, 1st sess. 99 Cong Rec. 15, 18, 24, which reads: The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of *un-American propaganda activities* in the United States, (2) the diffusion within the United States of subversive and *un-American propaganda* that is instigated from foreign countries or of a domestic origin and attacks the principle of the *form* of government as guaranteed by our Constitution, and (3) *all other questions* in relation to acts that would aid Congress in any necessary remedial legislation." (Emphasis added.)

It would be hard to imagine a more general authority or one more lacking in definite statements. Yet the Supreme Court held that it was sufficiently definite to allow the subcommittee to investigate communist ac-

tivities in education and, in particular, to question the petitioner (a teacher) about his own affiliations and to sustain a conviction for contempt for his failure to answer. The holding is based upon the long history of comparable investigative subcommittees and upon the rule that a legislative act need not be construed strictly and as it reads if it is accompanied by a "pervasive gloss of legislative history." Precisely the same point is involved in the present case. Too much legislative and judicial water has passed under the bridge for us to hold that any applicant who desired to make use of school buildings would not be fully aware of the meaning of the questions posed by the "Statement of Information." We have but given judicial life to the already established concepts with which the challenged statute deals. The statute, for the purposes here under consideration, is not, therefore, unconstitutional for vagueness or uncertainty. (See *American Communications Assn. v. Douds*, 339 U.S. 382, 413.)

The second contention of petitioners, viz., that the statute conflicts with federal legislation that occupies the field, is also without merit. They cite *Pennsylvania v. Nelson*, 350 U.S. 497, to support this contention, but this case is not in point. It dealt with the conflict between the Federal Smith Act (18 U.S.C. § 2385) and the Pennsylvania Sedition Act. Both statutes made knowing advocacy of the overthrow of the government by force or violence a crime. The United States Supreme Court ruled that Congress had occupied the field with the Smith Act and that the Pennsylvania

act was therefore in direct conflict with federal legislation and was unconstitutional. No parallel situation is involved here.

Furthermore, the Nelson case must be limited to its precise holding. As stated in *Uphaus v. Wyman*, 360 U.S. 72, at 76: The basis of *Nelson* thus *rejects* the notion that it stripped the States of the right to protect themselves. *All* the opinion proscribed was a race between federal and state prosecutors to the courthouse door . . . Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.'" (Emphasis added.)

Initially it should be noted that the present statute does not purport to relate to any but *acts* committed within the public school buildings of this State. It is designed solely for the purpose of the regulation of the use of such buildings. No applicable federal legislation on this subject has ever been passed. Thus there is no apparent*direct* conflict with any federal statute and Congress has not occupied the field. The reference to "communist-front and communist-action organizations required by law to be registered with the Attorney General of the United States" is likewise not in conflict with federal legislation. The only purpose for the inclusion of this phrase is to impart to the school board the information it must have in order to determine in

advance whether or not proscribed acts will be committed. No further application of this information is intended or permitted by the statute. Thus, the fact, without more, that such registration is required by a federal statute is not enough to show any direct conflict. (*First Unitarian Church v. County of Los Angeles,* 48 Cal.2d 419, rev'd. on other grounds, 357 U.S. 545.

The last contention of petitioners referred to above is that the statute violates due process. In this connection petitioners argue that the "Statement of Information" shifts the burden of proof to the applicant by requiring him to protest his innocence before being allowed to exercise an otherwise available right to the use of school property; that is, that the statute assesses a penalty without due process of law, in that no proof of the unfitness of applicant by the board is required before he is forced to prove his own innocence. The penalty would, presumably, be the depriving of the applicant of the use of school property. Petitioners rely principally on *Speiser v. Randall,* 357 U.S. 513. The *Speiser* case concerned the constitutionality of a California statute, which implemented the provision in the California Constitution that a tax exemption be denied to all persons who advocate the unlawful overthrow of the government. The statute required that an applicant for a tax exemption sign a statement on his tax return that he does not advocate the unlawful overthrow of the government.

The court found this statute to be unconstitutional because it restricted the taxpayer's freedom of speech without the procedural safeguards required by the due process clause of the Fourteenth Amendment by placing the burden of proof and persuasion of nonengagement in the proscribed advocacy on the applicant. The court viewed the withholding of a tax exemption as a "penalty" (in the nature of a criminal sanction) on speech; i.e., speech advocating the overthrow of the government, which is proscribed as a criminal activity and, as such, held that the State must bear the burden of proving that the taxpayer had in fact engaged in such activity before denying the exemption. However, as we have pointed out, the statute involved in the present case has as its purpose the achievement of an objective other than restraint on speech. In this respect, the present statute is more like the statute in the Douds case than the tax exemption statute in the Speiser case. In the Douds case, the requirement of the oath by union officers that they did not advocate the overthrow of the government was upheld *even though the initial burden of proof was upon them.* The *Speiser* court expressly recognized the essential distinction which also applies here; that is, where free speech is only incidentally restricted by a statute, and where the real objective is something other than such restriction, the burden of going forward with the proof of non-advocacy may constitutionally be placed (initially) on the individual. In distinguishing the Douds

case, the *Speiser* court held: "While the [Douds] court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The Congressional purpose was to *achieve an objective other than restraint on speech.* Only the *method of achieving this end* touched on protected rights and that only tangentially." (359 U.S. 513, 527.) (Emphasis added.)

Thus, the Speiser case is not here controlling. No restraint on speech or assembly, as such, is sought by the statute in question. The real objective is the protection of our public schools from the commission of subversive acts therein. Only "tangentially" does the statute restrict speech and assembly. There is, therefore, no violation of due process in the application of the challenged statute as it now stands.

We have decided that sections 16564 and 16565 of the Educational Code are constitutional and that petitioners herein are required to submit the "Statement of Information" to the school board before that agency may permit them to make use of public school facilities. In arriving at this conclusion we have not been unmindful of the great importance which all courts must attach to First Amendment rights. We fully agree that the courts must zealously protect the personal right of free speech for we believe that "free discussion contains the germ of progress which keeps flowing the blood stream of the Republic." (*In re Lygous*, 27 Cal.App.2d

293, 296.) And when the state undertakes to restrain unlawful acts, where, in so doing, it also restricts in some degree free speech and assembly, "only considerations of the greatest urgency can justify [the] restrictions." *Speiser v. Randall, supra,* p. 521.) But the validity of the restraint on speech and assembly in each case depends upon a careful analysis of the particular circumstances. (*Dennis v. United States, supra.*)

Courts may not blind themselves to reality nor are they justified in shrinking from shadows. In this case we are faced with the stark reality of active subversive elements operating at our very doorstep; working diligently and tirelessly in fanatic devotion to the dictates of our enemies. Through our Legislature, the people of our state have declared and ordained that these selfsame subversives shall not have access to the public school buildings of the state for the commission of acts of subversion. If this is not a just and proper exercise of free government, then we are indeed helpless as a state and as a nation. We cannot and shall not brand this legislative mandate as "unconstitutional." To do so might appease those among us who still believe that terrorists and revolutionaries should be allowed free rein in the public domain until such time as the first shot is fired, but this myopic idealism can lead only to ultimate disaster. We believe, with the court in *Dennis,* that: "overthrow of the government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ulti-

mate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected." (341 U.S. at 509.) Thus, viewing this mild legislation by which the Legislature has attempted, by the only means at its disposal, to protect our public schools from use of subversives or their fellow-travelers for the commission of acts of subversion or acts supporting subversion, we must conclude that, if the state cannot go at least this far in protecting its own interests, it is powerless to act in any effective manner. This legislation is a proper and necessary exercise of the Legislature's power in the fight against those who would destroy for all time those great principles which inure to us through our federal and state Constitutions.

The further point raised by petitioners concerning the discretionary 30-day application requirement of the respondent board may not be here considered since the petitioners have heretofore failed to perfect their applications by filing the required "Statement of Information."

The alternative writ is discharged, and the petition is denied.

Ashburn, J., and Kincaid, J. pro tem.;* concurred.

*Assigned by Chairman of Judicial Council.

[Civ. No. 24574. Second Dist., Div. Two. May 24, 1960.]

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA (a Corporation) et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO, Respondent.

PROCEEDING in mandamus to compel the Board of Education of the City of San Diego to grant petitioners the use of certain school buildings in which to hold public meetings. Writ denied.

A. L. Wirin, Abraham Gorenfeld, Irwin Gostin for Petitioners.

Henry A. Dietz, County Counsel (San Diego), Donald L. Clark and Joseph Kase, Jr., Deputy Attorney, for Respondent.

FOX, P. J.—Petitioners seek a writ of mandate to compel the respondent board of education to grant them the use of certain school buildings in the city of San Diego, in which to hold a series of monthly public meetings.

The issues presented by this petition are identical in all material respects with those presented in *American Civil Liberties Union v. Board of Education of the City of Los Angeles* (No. 24573, *ante*, [1]p. —— [——

Cal.Rptr. ——], decided this day. For the reasons expressed in the above opinion, the alternative writ is discharged and the petition is denied.

Ashburn, J., and Kincaid, J. pro tem.* concurred.

*Assigned by Chairman of Judicial Council.

APPENDIX "D"

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment in pertinent part provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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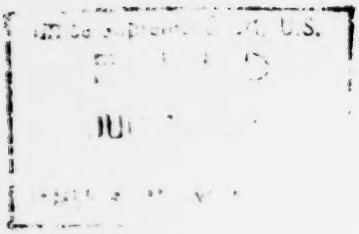

IN THE

Supreme Court of the United States

October Term, 1961
No. 1...2...

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,
Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

On Petition for Writs of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,
Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

On Petition for Writs of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinions of the California Supreme Court are reported in 55 Adv. Cal. 170 and 55 Adv. Cal. 190 (Petitioners Appendix "A" and "B").

Jurisdiction.

The judgments of the Supreme Court of California were entered on January 24, 1961; a Petition For Rehearing was denied by the California Supreme Court on February 21, 1961. The Petitions for Writs of Certiorari were filed on May 22, 1961. The jurisdiction of this Court is invoked under 28 U. S. Code Section 1257(3).

Questions Involved.

1. Whether there is presently a justiciable controversy between the Petitioner Board of Education of the City of Los Angeles and the Respondent.

2. Whether the judgment of the Supreme Court of California rests on an adequate non-federal ground.

Statutes Involved.

California Education Code Section 10550 provides:

> "Creation of civic centers and authorization of use of other properties. There is a civic center of each and every public school building and grounds within the State where the citizens, parent-teachers' associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the

citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities. (Stats. 1959, c. 2, p. 1110, §16556.)"

Section 16557 provides:

"Use subject to rules and regulations; interference with use for school purposes. The use of any public schoolhouse and grounds for any meeting is subject to such reasonable rules and regulations as the governing board of the district prescribes and shall in nowise interfere with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State. (Stats. 1959, c. 2, p. 1111, §16557.)"

Section 16564 provides:

"Use to further program for overthrow of the government by force a misdemeanor. Any use, by any individual, society, group, organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered.

Any individual, society, group, or organization which commits any act intended to further any program or movement the purpose of which is to

accomplish the overthrow of the government by force, violence or other unlawful means while using school property pursuant to the provisions of this chapter (commencing at Section 16551), is guilty of a misdemeanor. (Stats. 1959, c. 2, p. 1112, §16564.)"

Section 16565 in relevant part provides:

"Determination of intention; form of information and discretion of board. No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.

For the purpose of determination by such governing board whether or not any individual, society, group or organization applying for the use of such school property intends to violate Section 1656, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

STATEMENT OF INFORMATION

The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence of other unlawful means;

That . . ., the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California by force, violence, or other unlawful means, and that, to the best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

.....

(Signature)

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made could not violate Section 16564 of the Education Code."

ARGUMENT.

I.

No Justiciable Controversy Between One Petitioner and the Respondent.

There is presently no justiciable controversy between the Petitioner, Board of Education of the City of Los Angeles, Respondent, with respect to the oath requirement adjudicated by the California Courts.

Subsequent to the decision of the California Supreme Court herein, and on April 6, 1961, that Petitioner adopted a new regulation, imposing an oath requirement *different* from the one passed upon by the California Courts; hence, there is no warrant for this Court to review the matter, since that Petitioner is not now enforcing, the oath at issue in the courts of California.

The text of this new and different declaration is set forth in Appendix "A", annexed to this Brief.

Cf.:

Pauling v. McElroy, 364 U. S. 835; also
Pauling v. Eastland, 364 U. S. 900.

II.

The Judgment of the Supreme Court of California Rests Upon an Adequate Non-Federal Ground.

The decision is posited upon the provisions of the Constitution of California,[1] and upon an earlier ruling by that Court; hence the judgment below is encased in adequate non-federal pillars, stout enough to uphold the judgment, independent of any federal support.

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[1]The text of these provisions is set forth in the Petition, page 8, footnote.

The Petitions for Writ of Mandate, filed in the California Courts by the Respondent here, challenged the oath requirement on both federal and state grounds—namely, that it violated the California Constitution, as well as the Constitution of the United States.

The California Supreme Court thus stated the position of the Respondent:

(Appendix to Petition for Writ of Certiorari, p. 3):

> "Petitioners refused to furnish the prescribed statement primarily on the ground that such test oath requirement abridged both the state and federal constitutional guarantees of freedom of speech and assembly. (U. S. Const., Amendments I and XIV; Cal. Const. art. I, §§9, 10.)"

After the decision of the California Supreme Court, in a Petition for Rehearing (p. 3) filed in that Court,[2] by the Petitioners here, they urged the following:

> "THE OPINION SHOULD BE MODIFIED TO INDICATE WHETHER THE STATUTE INVOLVED IS UNCONSTITUTIONAL BECAUSE IT CONFLICTS WITH THE STATE CONSTITUTION OR BECAUSE IT CONFLICTS WITH THE UNITED STATES CONSTITUTION.
>
> "The Court has held a statute enacted by the legislature unconstitutional. It is a matter of great concern to petitioners herein whether the court holds the legislative enactment invaiid because of conflict with the California Constitution.

---

[2]Copies of all pleadings and briefs before the Supreme Court of California have been filed by the Petitioners with the Clerk of this Court.

"The American Civil Liberties Union raised both federal and non-federal questions in the proceedings (see Opinion of Court, p. 4), and the opinions do not expressly declare upon which ground the judgment is based. (See *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U. S. 157 (1917), *Fox Film Co. v. Muller*, 296 U. S. 207 (1935)[2a]; *Chicago B. & Q. Ry. Co. v. Illinois*, 200 U. S. 561 (1905).)

"Petitioners request that the opinions be modified to express whether the statute is in conflict with the Constitution of the State of California or the Constitution of the United States."

We think this is a recognition by the Petitioners themselves, that the judgment of the California Supreme Court rested on a non-federal ground.

The Respondent in its Answer to Petition for Rehearing, (p. 1) urged upon the Court below that, "There is adequate state constitutional basis to support the decision and judgment of this (the California Supreme) Court." That Court denied a rehearing.

Moreover, the core of the controversy in the California Courts was the effect of, and the present applicability of, an earlier decision of that Court, holding invalid in 1940, a somewhat similar "Loyalty Oath".

Danskin v. San Diego Unified School District, 28 Cal. 2d 536.

The California Supreme Court ruled in the instant case that (Appendix "A", to Petition, p. 9), "The present Statute thus has the same vice which caused us to

[2a] The Respondent relies on this decision of this Court, also.

strike down its predecessor section in *Danskin*." In arriving at its conclusion, the Court cited *Danskin* half a dozen times, and a major portion of its decision in the instant case consists of extended quotations from its opinion in that case.[4] Indeed, the Justices of the California Supreme Court in the minority, essentially took issue with the majority, as to the import of *Danskin*, stating, (Appendix "B" to Petition, p. 6): "It therefore does no violence to due process nor to the principles enunciated by this court in the *Danskin* case, *supra*, relied upon by the majority opinion", thus acknowledging that the majority of the Court posited its ruling upon the *Danskin* case.

It is to be further noted that the California District Court of Appeal recognized that the Respondent here "relied principally upon *Danskin v. San Diego Unified School District, supra*." (Appendix C to Petition, p. 9); and concluded (Appendix C. to Petition, p. 15) that the distinction "between the *Danskin* case and the instant matter is clear." That Court, essentially followed the request urged upon it by the Petitioners there that the California Courts "re-examine and distinguish *Danskin* in view of the changing times since that decision was handed down." (Alternative Writ, etc., p. 9.)

Because the District Court of Appeal had "distinguished" the *Danskin* decision, and ruled that it was no longer applicable, the Respondent herein in its Peti-

---

[4]The Respondent's Memorandum of Points and Authorities in Support of Petition for Writ of Mandate, filed in the California courts, had resorted to the same pattern. (See pp. 3, 5, 7, 11, 12, 13, 14, 22, 23, 24, and 25.) The last four pages comprising the "conclusion" of the Memorandum, is no more than an elaborate quotation from the *Danskin* case.

tion for Hearing to the California Supreme Court, seeking a review of, and a reversal, of the judgment of that California intermediate Appellate Court, urged the Supreme Court of California to grant a hearing stating (Petition for Hearing, p. 2):

> "Hearing should be granted by this (the California Supreme Court) Court because it is necessary to settle an important state-wide question of law, namely the constitutionality of Education Code §10505 which requires the signing of a 'Statement of Information', under penalty of perjury, as to advocacy and organizational labeling as a condition for the use of school auditoriums for public meetings.
>
> "*Hearing is also necessary by this Court in order to settle the important question of law as to the meaning of the free speech guarantee in this state and the meaning of this Court's decision in Danskin v. San Diego Unified School District*, 28 Cal. 2d 536 *by reason of the fact that the court below ruled that the Danskin case no longer represented the law.*" (Italics supplied.)

The highest Court of California did grant a hearing, and rejected the interpretation placed upon the *Danskin* case by the California District Court of Appeal.[1]

Accordingly, the decision which the petitioners seek to review in this Court, is no more than a ruling of a state court interpreting and applying a former ruling

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[1] It is noteworthy that the Justices of the California Supreme Court who were parties to the "decision" the validity of the District Court of Appeal. (Appendix "B" to Pet., pp. "A" and "B," pp. 7, 8, 9 and 10.)

made by a state Court, posited upon the provisions of a state constitution.

Additionally, in adhering in the instant case to its views expressed earlier in the *Dayskin* case, the California Supreme Court implicitly reaffirmed the principle established in that case—a principle of California state law—and a "Loyalty Oath" requirement, in the circumstances of this case, is illegal because it is improper "to require proof from any persons or groups that they are not subversive elements". (The *Dayskin* case, *supra*, at p. 548.)

In any event, the California statute set aside by the California Supreme Court here is manifestly unconstitutional, if there are applied to it the principles of the *Speiser* case, accepting the gloss on that case by this Court in *Konigsberg v. State Bar of California*, 366 U. S. 36.

Here, as in *Speiser*, the burden of proof is shifted to the applicant.

In *Speiser* the striking of the exemption did not automatically require the granting of the exemption (357 U. S. 513, 517); similarly, Education Code Section 10503[3] provides that the School Board (as the tax assessor in *Speiser*) may require the furnishing of such additional information as it deems necessary to determine whether there is a violation of Section 10504.

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[3] See page 2

It is to be noted that Section 10504 defines a crime[5] namely, the use of school property for certain illegal purposes; accordingly, the Board, in effect, makes a determination based upon the statements contained in the oath, and such other information as it may secure, whether the applicant has committed the crime proscribed in Section 10504; (and, additionally, in effect, whether the applicant has violated the Federal Smith Act and the California Criminal Syndacalism Act, as did the tax assessor in *Speiser*).

Hence, the effect of these Education Code Sections is to place the burden of proof of non-commission of a crime upon the applicant.

These sections were adopted by the California legislature in 1952 after *Danskin, supra*, and particularly after *Goodman v. Board*, 48 Cal. App. 2d 731.

Prior to the present provision, the then section was construed in *Goodman* as placing the burden of proof on the Board; Section 10504 expressly shifted the burden of proof to the applicant.

In any event, on this issue the Petitioners do not seem to be in disaccord with the Respondent; for they say (Petition, p. 22),

> "The first part of the investigation is the required statement of information (Calif. Education Code, Sec 10565). If the applicant furnishes the statement of information, the school board may

[5] The criminal sanction is omitted by the Petitioners in their reference (Pet. p. 5, fn 6) to the statute. Emphasis involved, also omitted by the Petitioners is the summary caution of that statute, declared by the California Legislature which reads: "Use to further program for overthrow of Government by force is a misdemeanor."

> need to make further inquiry;" this because . . . "the governing boards of local school districts (have) the duty of investigating and determining when use of school property" should be denied." (Petition, p. 10.) They also assert, (p. 22)
>
> "This is the first step in the investigation of the applicant."

Accordingly the statutory provisions here, similar to the pattern of the California Legislature's enactment, before this Court in *Speiser*, are indistinguishable in constitutional import, from those set aside in *Speiser*; accordingly *Speiser* is so definitely dispositive of that issue, that no review by this Court is necessary.

In any event the Petitioners seemed to treat the Legislature of California, as the equivalent of the entire State of California (Petition, pp. 14, 17, and 19), and they state (p. 7): "It is, of course, entirely reasonable for a *state* to attempt to protect itself from violent overthrow."

We agree. But that obligation is upon the California Courts too; for the California Legislature is only one of the three departments of government in the State of California.

In the Civic Center Act, Education Code, Section 10556, page 2, the California Legislature established school buildings as Civic Centers "where organizations may meet and discuss, from time to time, in the open forum, any subjects and questions which, in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside." The following section 10557, expressly provides that a meeting of "any organization" shall not interfere with school activities. There has been a claim in the California courts and there is no claim here by the Petitioners, that the proposed meetings of the Respondent or the over current and highly important subject "The Bill of Rights," will in any manner interfere with school purposes.

Pursuant to its authority and duty, under the Constitution of California, as the guardian both of the security of the state and the rights of the people of California, the Supreme Court of California has found that there is no danger clear, present,[10] or at all, warranting the abridgment, in the instant case, of the rights of assembly protected by the California Constitution, for the Court said (Petition, Appendix "A", p. 14) "No such finding (that Communists had advocated concrete action in public meetings in California) was made" by the California Legislature. The Court went on to add, ". . . and we apprehended that no such finding could be supported by substantial evidence."

Indeed, the California Legislature in its current session, lasting six months, and just concluded, *rejected* a proposal to enact a new Loyalty Oath requirement, similar to the one adopted by the Petitioner Board of Education of the City of Los Angeles, *supra*, at page 6, Appendix hereto, "A". The text of the Bill is set forth in Appendix "B" annexed hereto.

The proposal passed the Assembly of California on April 18, 1961; reaching the California Senate it was referred to the Committee on Education, where it died.[11]

We think either or both of the following inferences may be drawn from the non-action of the California Legislature:

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[10]The California Supreme Court has made it clear, but recently, in *Kerr v. Superior Court of Los Angeles*, 52 Cal. 2d 340, that it accepted the version of that rule, as explained in *Dennis v. United States*, 341 U. S. 494, and as reformulated by Judge Learned Hand, indeed, in the instant case it applied the "clear and present danger" test. See Appendix "A" to Pet., p. 14.

[11]California Assembly Weekly History for Monday, May 15, 1961, page 351.

1. A majority of the California Legislature accept the decision of the California Supreme Court in this case, as expressing sound policy for the State of California.

2. The California Legislature is now of the view that there is no danger in California to warrant, and there is no need for, a "Loyalty Oath" in connection with public meetings at Civic Centers in California.[12]

In *Parker v. Los Angeles County*, 338 U. S. 327, this Court dismissed the Petition there, to afford the California Supreme Court an opportunity to decide the issues in that case, under local law; in the instant case, the California Supreme Court has done just that, with respect to the issues here.

Conclusion.

Accordingly, the Petition should be denied, because the judgment is grounded on an adequate non-federal base.[13]

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Attorneys for Respondent.

[12] We refer to California Legislature [illegible] of the United States Supreme Court [illegible] the California Legislature [illegible]

[13] Compare *[illegible]* 2[illegible] U. S. 27 [illegible] 321 U. S. 222, [illegible] 335 U. S. 297.

Appendix "A".

LOS ANGELES CITY SCHOOL DISTRICTS

STATEMENT OF INFORMATION

.....

(Name of Organization)

"The undersigned states that, to the best of his knowledge, the school property for use which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime including, but not limited to, the crime specified in Sections 11400 and 11401 of the California Penal Code. This statement is made under the penalties of perjury:"

.....	.....
Signature	Title or Office Held
.....	.....
Street	Phone (Business Hours)
.....	.....
City Zone	Date

Please complete this form and return to:

Civic Center Permit Office
Los Angeles City Board of Education
P. O. Box 3307, Terminal Annex
Los Angeles 54, California

Appendix "B".

Amended in Assembly April 13, 1961
Amended in Assembly April 12, 1961
Amended in Assembly March 24, 1961

CALIFORNIA LEGISLATURE, 1961 REGULAR (GENERAL) SESSION

ASSEMBLY BILL No. 1559

Introduced by Messrs. Francis, Levering, Shell, Reagan, Bruce F. Allen, Belotti, Britschgi, Burke, Collier, Cologne, Conrad, Coolidge, Cusanovich, Grant, Lanterman, Monagan, Mulford, Pattee, Schrade, Sedgwick, and Wolfrum

February 9, 1961

REFERRED TO COMMITTEE ON EDUCATION

An act to amend Sections 10504 and 10505 OF THE EDUCATION CODE, *relating to use of school property.*

The people of the State of California do enact as follows:

SECTION 1. Section 10504 of the Education Code is amended to read:

10504. Any use, by any individual, society, group, or organization for the commission of any act intended to advocate or teach concrete action for the overthrow of the government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered.

IN THE

Supreme Court of the United States

October Term, 1961

No. 108

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA et al

Respondents

BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,

Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA et al

Respondents

On Petition for Writs of Certiorari to the Supreme Court of the State of California

REPLY BRIEF FOR PETITIONERS

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Respondents.

On Petition for Writs of Certiorari to the Supreme Court of the State of California

REPLY BRIEF FOR PETITIONERS

I.

PETITIONER, BOARD OF EDUCATION OF THE CITY OF LOS ANGELES IS USING THE REGULATION CITED BY RESPONDENTS DURING THE INTERREGNUM BETWEEN THE ISSUANCE OF THE MANDATE OF THE CALIFORNIA SUPREME COURT AND ACTION BY THIS COURT ON THE PENDING PETITION (REPLY TO RESPONDENTS' POINT I).

Respondents attempt to forestall a review of the action of the California Supreme Court by alleging

the absence of a justiciable controversy between the respondents and one petitioner, Board of Education of the City of Los Angeles due to a regulation adopted by that petitioner (Resp. Br., Appx. "A"). In so doing, respondents argue as if the new regulation was necessarily a permanent one. Not so. This petitioner, faced with a peremptory writ of mandate from the highest court of California, felt obligated to take some action to comply with the court's directive and still enforce Section 16564 of the Education Code which section proscribes the use of school property for acts of subversion.

Petitioner fully intends to again require full compliance with Section 16565 of the Education Code should this Court determine that such compliance may be constitutionallly required.

In any event, it should be recognized that this petitioner has the ability to revoke this regulation at any time and again require compliance with Section 16565 of the Education Code. Thus, it cannot be said that mere cessation of a prohibited activity renders the pending matter non-justiciable since petitioner may again resume enforcing the statute. (cf.: *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290; *Walling v. Helmerich & Payne*, 323 U.S. 37)

Further, since this petition is a joint one and involves identical questions as to both petitioners, it appears to be of little avail to respondents to allege non-

justiciability as to only one petitioner. Even assuming the validity of respondents' argument, this Court is faced with the identical constitutional issues with regards to the other petitioner, Board of Education of the City of San Diego.

II.

A FEDERAL QUESTION IS PRESENTED IN THIS CASE BECAUSE (1) THE OPINION IS BOTTOMED, IN PART, ON AN EARLIER STATE COURT DECISION WHICH INTERPRETED THE SCOPE OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, AND (2) THE STATE COURT HAS HERE INTERPRETED FEDERAL CONSTITUTIONAL PROVISIONS AS BEING CO-EXTENSIVE WITH THE COUNTERPART STATE CONSTITUTIONAL PROVISIONS (REPLY TO RESPONDENTS' POINT II).

There is no gainsaying the fact that the Supreme Court of California grounded its opinion in the instant case in part on its earlier decision in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536. *Danskin*, however, is not, as respondents would have it, a ruling ". . . posited upon the provisions of a state constitution." (Resp. Br., pp. 10-11). That decision in so many words indicated that it was based on the application of federal constitutional principles.

> "These cases (*Communist Party v. Peck*, 20 Cal. 2d 536, and other cited cases) involved the general test of reasonableness under the due pro-

> cess clause, *whereas the present case calls for the application of the strict standards of the First Amendment, which in the fields protected by that Amendment are read into the Fourteenth Amendment.*" *Danskin,* supra, 28 Cal. 2d at 550.
> (Brackets and emphasis ours)[Fn.]

Thus, the *Danskin* decision necessarily involved the construction and scope of federal constitutional rights, by the State Court.

While respondents state that the instant decision rests on non-federal grounds (Resp. Br., p. 6), the opinion of the Supreme Court of the State of California nowhere states exactly what sections of the Federal or State Constitution are assertedly violated. Although the Supreme Court of California indicated at the beginning of its opinion (Petition, Appx. "A," 3A), that the basis for respondents (petitioners below) refusal to conform to the requirements of Section 16565 of the Education Code was an asserted violation of both the Federal and State Constitutions, nowhere else in the opinion does the Court even mention the State Constitutional provisions, but, on the contrary, relys in the main on opinions of this Court interpreting Federal constitutional rights. Even *Danskin*, relied on by the Court below, is, as pointed out, supra, a decision based on Federal grounds.

[Fn.] Compare the language of the concerning opinion of Mr. Justice Carter in *Danskin*, supra, which recognizes the Federal grounds implicit in the decision: "In my opinion this (the legislation under attack) cannot be done without violating the provisions of the First and Fourteenth Amendments to the Constitution of the United States" (28 Cal. 2d at 556)

Further, an examination of the language of *Danskin*, supra, and of the Court's decision in the case at bar, indicates that the Court below speaks only in broad terms of "unconstitutionality," treating the State and Federal constitutional provisions as co-extensive, and in effect placing idential meanings on them. Thus, no distinction is made between the provisions of the Federal bill of rights as made applicable to the States by the Fourteenth Amendment and the bill of rights provisions in the State constitution,[Fn.] the California court apparently construing the state and federal provisions as one.

California constitutional freedoms of speech and assembly are no broader than the federal constitutional freedoms nor are they more restrictive. A violation of one violates the other; a statute permissive under one is permissive under the other. The judicial interpretations by the California court of the Federal Constitution and its counterparts in the State Constitution constitute one unified body of law.

The contention of respondents that this decision rests solely on non-federal grounds seems to logically lead to the conclusion that *no* case in which a State statute is held constitutionally infirm by a State Court as being in conflict with one of the rights protected by the United States Constitution could ever be reviewed

[Fn.] The rights of freedom of speech and assembly provided in the State Constitution are not identical in wording to those in the Federal Constitution (cf Petition p 8 and Petition Appx "D")

by this Court if the same right was protected by the same or similar provision in the State Constitution. Where, as here, the federally adopted decisions form the heart and core of the constitutional interpretation by the State court, it is submitted this Court has jurisdiction to review. (See: *Standard Oil Co. of Calif. v. Johnson,* 316 U.S. 481; see also the dissenting opinion of Frankfurter, J., in *Flournoy v. Wiener,* 321 U.S. 253, 270-272, and the opinon of Holmes, J., in *Schlemmer v. Buffalo, R. & P. R. Co.,* 205 U.S. 1, 11).

III.

RESPONDENTS HAVE MISQUOTED FROM THE TEXT OF PETITIONER'S PETITION FOR REHEARING FILED IN THE COURT BELOW.

As printed in respondents' brief (Resp. Br., pp. 7-8) a certain phrase was omitted from the text of the quotation taken from the Petition for Rehearing filed with the California Supreme Court. Such an omission, while undoubtedly inadvertent, seriously alters the meaning and context of petitioner's request for a modification of the court's opinion. The quotation at page 7 of respondents' brief should correctly read:

> "THE OPINION SHOULD BE MODIFED TO INDICATE WHETHER THE STATUTE INVOLVED IS UNCONSTITUTIONAL BECAUSE IT CONFLICTS WITH THE STATE CONSTITUTION OR BECAUSE IT CONFLICTS WITH THE UNITED STATES CONSTITUTION."
>
> "The court has held a statute enacted by the legislature unconstitutional. It is a matter of great concern to petitioners herein whether the court holds the legislative enactment invalid *because of conflict with the United States Constitution or* because of conflict with the California Constitution."

The emphasized words were omitted in the brief submitted by the respondents.

Of course what petitioners were requesting of the Court below was a clarification of its ambiguous holding that Section 16565 of the Education Code was unconstitutional (See Reply to Respondents' Point II, infra) in order to erase any doubt as to the federal basis for the decision.

Respectfully submitted

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